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In the Supreme Court of the United States

October Term, 1982

PALLAS SHIPPING AGENCY, LTD.,
Petitioner,

vs.

JOSEPH DURIS,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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QUESTION PRESENTED FOR REVIEW

Does the acceptance by an injured longshoreman of voluntarily paid compensation and the filing of Form LS-208 by his employer with the deputy commissioner trigger the assignment provisions of section 33(b) of the Longshoremen's and Harbor Workers' Compensation Act?

LIST OF ALL PARTIES

Joseph Duris - Plaintiff-Appellant

Erato Shipping, Incorporated;

Japan Line Limited;

Regent Botan Shipping, Inc.;

Pallas Shipping Agency, Ltd.
Defendants-Appellees

Joseph Duris is the Respondent herein. Pallas Shipping Agency, Ltd. is the sole Petitioner herein.

DESIGNATION OF CORPORATE RELATIONSHIPS

Pallas Shipping Agency, Ltd., was incorporated under the laws of Liberia on March 18, 1977. On October 27, 1977, it entered into "Articles of Merger" with Erato Shipping, Incorporated. Pallas Shipping Agency, Ltd., has no subsidiaries and has no corporate connections with Japan Line Limited or Regent Botan Shipping, Inc.

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No.

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For the Sixth Circuit

OPINION BELOW

The opinion of the United States Court of Appeals is unreported. It bears the title of *Joseph Duris v. Erato Shipping, Incorporated; Japan Line Limited; Regent Botan Shipping, Inc.; Pallas Shipping Agency, Ltd.*, and is reprinted in the Appendix to this petition.

JURISDICTION

The opinion of the Court of Appeals for the Sixth Circuit sought to be reviewed herein was entered on July 16, 1982, and this petition for writ of certiorari is filed within ninety days of that date.

No petition for rehearing was filed in the Court of Appeals. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 33 U.S.C. § 933(a) provides:

"If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person."

Title 33 U.S.C. § 933(b) provides:

"Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner or Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person *unless such person shall commence an action against such third person within six months after such award.*" (Emphasis supplied.)

STATEMENT OF THE CASE

The Respondent herein was voluntarily paid compensation by his employer, without an award, for the period from May 20, 1975, to April 26, 1977. On that date his employer filed with the deputy commissioner form SL-208, entitled "Compensation Payment Stopped or Suspended."

On April 8, 1980, Respondent filed an amended complaint against Pallas Shipping Agency, Ltd. That complaint was dismissed by the District Court on the ground that *in personam* jurisdiction over Pallas had not been

established. The issue concerning the time-barring of the Respondent's claim against Pallas by reason of the limitation period in section 33 of the Longshoremen's and Harbor Workers' Compensation Act was not reached by the District Court.

The Court of Appeals ruled that although Pallas has never had any business contacts in Ohio, its constituent corporation, Erato Shipping, did have such contacts and when Erato merged with Pallas, the latter became liable for all of the claims against Erato. On the issue of the time-barring of the claims against Pallas, the Court of Appeals ruled that subsection 33 does not encompass all claims paid under the Act; that the acceptance of compensation payments, in and of itself, does not create an assignment to the employer, and that the third-party claim does not expire in six months.

The Petitioner seeks a review of this ruling of the Court of Appeals.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The ruling of the Court below is contrary to the ruling of this Court in *Rodriguez v. Compass Shipping Co., Ltd.*, 451 U.S. 596, 101 S. Ct. 1945, 68 L. Ed. 2d 472 (1981), which affirmed the judgment of the United States Court of Appeals for the Second Circuit in 617 F.2d 955 (2nd Cir. 1980). It is also contrary to the ruling of the United States Court of Appeals for the Fourth Circuit in *Simmons v. Sea-Land Services*, 676 F.2d 106 (4th Cir. 1982) and *Ambrosino v. Transoceanic S.S. Co., Ltd.*, 675 F.2d 470 (2nd Cir. 1982) In addition to these conflicts, the Court below declined to follow *Liberty Mutual Insurance Co. v. Ameta & Co.*, 564 F.2d 1097 (4th Cir. 1977) and *Larson*

v. Associated Container Transport (Australia) Ltd., 459 F. Supp. 561 (E.D. Va. 1978). The resolving of these conflicts by this Court is, we respectfully suggest, required.

1. In *Rodriguez*, three cases were involved. In two of the cases no formal compensation orders were entered but the plaintiffs and their employers agreed to settlements involving the payment of compensation. One plaintiff filed a third-party suit after 32 months, another after approximately 15 months, and the third one year after accepting compensation. The District Courts granted motions for summary judgment filed by the respondent shipowners because the longshoremen's failure to bring suit within six months had operated to assign their causes of action to their employers. The Court of Appeals for the Second Circuit affirmed and this Court granted certiorari to resolve the conflict with the Court of Appeals for the Fourth Circuit in *Caldwell v. Ogden Sea Transport Inc.*, 618 F.2d 1037 (4th Cir. 1980), 101 S. Ct. 69, 66 L. Ed. 2d 20.

For the purposes of its decision in *Rodriguez, supra*, at page 1948, this Court assumed that the acceptance of compensation by the longshoremen operated as an assignment under § 933(b).

This Court, speaking through Mr. Justice Stevens, stated the issue before it in the following language (101 S. Ct. at p. 1949):

> "• • • The question presented by this case is what, if any, right the longshoreman has against the third-party shipowner if he does not sue within the 6-month period and the employer fails to do so thereafter. *Both the plain language of the statute and the history of its amendments dictate the same answer.*" (Emphasis supplied.)

In referring to the plain statutory language contained in § 933(b), this Court said (101 S. Ct. at p. 1950):

"Application of this plain statutory language to the undisputed facts in these cases leads to the conclusion that petitioners may not pursue their claims for damages against the respondent shipowners. *Petitioners filed these actions well beyond the 6-month period following acceptance of compensation, and offered no excuse for their delay.* Although their employers failed to pursue the assigned claims, the statute does not expressly require that employers pursue third-party claims, nor does it provide for relief to employees should the assigned claims lie dormant. Therefore, petitioners appear to be without a cause of action under the statute. (Emphasis supplied.)

This Court gave extended consideration to the question of the conflict of interest (a matter which is one of the principal reasons for the ruling in the instant case), 101 S. Ct. 1951 (1954), and concluded that the problem was solved by amending § 933(b) to postpone the assignment by operation of law until six months after the acceptance of compensation under an award, and by amending § 933(e) to allow an employer to retain one-fifth of the net proceeds of its successful third-party action.

Finally, this Court said (101 S. Ct. 1957-58):

"In sum, we conclude that the Court of Appeals in these cases correctly held that § 33(b) precludes petitioners from pursuing their third-party claims. Whatever the continued validity of our decision in *Czaplicki*, a question we need not and do not decide today, these cases do not involve 'the peculiar facts' on which *Czaplicki* was based. Rather, petitioners essentially have relied upon conflicts inherent in the statutory

> scheme and in the relationships among longshoremen, stevedores, and shipowners. The notion adopted in some post-*Czaplicki* decisions that a conflict of interest may be presumed whenever an employer does not sue on an assigned claim *is simply untenable in light of the plain statutory language and the history of the 1959 and 1972 Amendments.* • • •" (Emphasis supplied.)

The ruling of this Court in these cases on the issue of the assignment of claims under § 933(b) at the expiration of the six-month period is controlling. The Court below, in the instant case, not only declined to follow *Rodriguez*, but cited it only for the sole proposition that the failure of the employer, after the assignment, to sue, causes the claim to expire (App. p. A5).

2. In each of the cases involved in the consolidated appeals in *Simmons v. Sea-Land Services, et al., supra*, the injured employees received compensation payments which were voluntarily paid. The principal issues before the Court of Appeals for the Fourth Circuit were the identification of the "event or events which create 'an award in a compensation order' sufficient to trigger the six-month period set forth in Section 933(b)" and "whether an assignee who has acquired the claim upon the expiration of the six-month period may reassign that claim to the injured longshoreman." (676 F.2d at p. 108).

In addressing the first issue, the Court of Appeals stated at p. 109:

> "Having determined that Section 933(b) *contemplates an informal award*, we next turn to the requisites of such an award. As revealed by the facts of these cases, a number of events may occur during the disability period which could be interpreted as the culmination of an informal award. However, as we stated in

Ameta, the essence of an award is *'an act of ratification of compensation, whether formal or informal, and the subsequent acceptance by the claimant.'* 564 F.2d at 1102. In addition, the award must serve the dual purpose of protecting the welfare and rights of the longshoreman while not unduly delaying the employer's access to relief from the negligent third party.

"With these concepts in mind, we hold that 'an award in a compensation order' is created by the completion of three events: (1) the employer, having not contravened its liability, initiates compensation payments to the longshoreman; (2) the deputy commissioner files the employer's notice that compensation payments have been initiated; and (3) the longshoreman accepts any of the payments. *Such an award triggers the six-month period without regard to subsequent suspensions in payment or formal awards of benefits.* We believe that this rule will foster the prompt payment of benefits by eliminating the need for perfunctory contravention by the employer, and will provide the employer with access to its remedies within a reasonable time. As in all such cases, the six-month period will protect the longshoreman by giving him an opportunity to investigate and weigh his options." (Emphasis supplied.)

In the case at bar it is uncontradicted that the Respondent accepted compensation for his injuries from his employer and that his employer filed with the deputy commissioner a notice that the "compensation had been stopped or suspended." It is also uncontradicted that the Respondent accepted all of the payments of compensation which were made. Thus all of the requirements for the triggering of the assignment, set forth in *Simmons, supra*, were met. The ruling of the Court below that, in spite

of the succession of these events, the assignment under § 933(b) did not take place, is in direct conflict with the *Simmons* decision.

3. In *Ambrosino v. Transoceanic S.S. Co., Ltd., supra*, the longshoremen accepted compensation from their employer following an informal conference convened by a Department of Labor claims examiner. No formal compensation orders were entered. They then brought suit against the vessel owner more than six months after acceptance of payment from their employer. The District Court granted the shipowner's motion for summary judgment. 675 F.2d at p. 471.

The Court of Appeals for the Second Circuit ruled that the amendment to the regulations of September 9, 1977, did not change the result reached in *Rodriguez*, 617 F.2d 955 (2nd Cir. 1980), and that an agreement to pay compensation reached at an informal conference constituted an "award in a compensation order." 675 F.2d at p. 472.

In *Rodriguez v. Compass Shipping Co., supra*, the longshoreman brought a personal injury action against the vessel owner and charterer. The Circuit Court of Appeals affirmed the decision of the District Court in dismissing the suit and ruled that the acceptance of compensation pursuant to an agreement with his employer and approval by a claims examiner, plus the failure to sue within six months, operated to automatically assign the claim to his employer under the provisions of § 933(b). In support of its ruling in that regard, the Court, at p. 956, cited the following decisions:

Panzella v. Skou, 471 F. Supp. 303 (D.C. N.Y. 1979);

Francavilla v. Bank Line, Ltd., 470 F. Supp. 94 (S.D. N.Y. 1979);

Perez v. Arya National Shipping Line, Ltd., 468 F. Supp. 799 (S.D. N.Y. 1979);

Hernandez v. Costa Armatori, 467 F. Supp. 1064 (E.D. N.Y. 1979);

Perez v. Costa Armatori, 465 F. Supp. 1211 (S.D. N.Y. 1979);

Bandy v. Bank Line, Ltd., 442 F. Supp. 882 (E.D. Va. 1977).

In *Larson v. Associated Container Transportation (Australia) Ltd., supra*, an action brought by an injured longshoreman against the shipowner was dismissed by the District Court as untimely because not filed within six months from the acceptance of compensation and the filing of documents with the Department of Labor. In so doing, the Court stated (459 F. Supp. at p. 564):

"Thus, the Court concludes that the payment of benefits under the LHWCA with the requisite filing of documents and reports with U. S. Department of Labor *and the acceptance of those payments by the plaintiff started the six-month period of section 33(b) to run.* That these filings, payments and acceptance of compensation should be deemed to constitute an informal award so as to begin the six-month period is buttressed further by the provisions of sections 14(h), (i). 33 U.S.C. §§ 914(h), (i). Under those sections, the deputy commissioner at any time in a case in which payments are being made without a formal award may take such action necessary, including requiring an employer to deposit monies with the United States, to secure payment of compensation to the injured person.

"The absence of such action or any other intervention by the deputy commissioner after the commencement and acceptance of payments and receipt of requisite fil-

> ings by the employer *constitute sufficient acceptance and ratification of such compensation to amount to an informal award under section 33(b)*. As noted above, any contrary result would operate only to give an employer every incentive to controvert liability in all cases or to terminate compensation at an early stage in order to protect his statutory right to an assignment and to deny the injured person prompt monetary and medical assistance at a time when he needs it the most." (Emphasis supplied.)

In *Liberty Mutual Ins. Co. v. Ameta & Co., supra,* the insurer of the employer, a stevedoring company, brought an action against the shipowner and the injured longshoreman, who was paid benefits under the LHWCA but who also obtained voluntary settlement from the shipowner. The District Court entered judgment in favor of the insurer for $1,000 but ruled in favor of the shipowner and longshoreman with respect to the remainder of the insurer's lien. The insurer appealed and the shipowner and longshoreman cross-appealed. On the issue involved in the instant case the Court of Appeals ruled that the documents which were received, filed and accepted by the Deputy Commissioner constituted an "award of benefits in a compensation order" despite the absence of the entry of a formal award and that the longshoreman's rights had been assigned to the insurer (564 F.2d at pp. 1101 and 1102).

The controlling effect of the acceptance of compensation by the injured longshoreman is emphasized by the Court of Appeals for the Fourth Circuit at page 1102, where it states:

> "Two decisions and reference to parallel language regarding 'awards' in various sections of the Act demonstrate that an award under a compensation order does not require formal entry of an award *per se*. *Rather,*

the focus should properly be upon some act of ratification of compensation, whether formal or informal, and the subsequent acceptance of compensation by the claimant." (Emphasis supplied.)

The refusal of the Court below to follow either *Larson* or *Liberty Mutual* is clear and unequivocal (App. p. A3). It is also unjustified.

CONCLUSION

For the reasons set forth herein and because the Court of Appeals for the Sixth Circuit has, in its holding that the mere receipt of compensation benefits under the Act, plus the filing of Form LS-208, does not trigger the assignment provision of Section 933(b) is contrary to and in direct conflict with the ruling of this Court in *Rodriguez v. Compass Shipping Co., Ltd.*, the ruling of the Court of Appeals for the Fourth Circuit in *Simmons v. Sea-Land Services, Inc.* and *Liberty Mutual Insurance Company v. Ameta & Company* and the Court of Appeals for the Second Circuit in *Ambrosino v. Transoceanic S.S. Co., Ltd.*, the resolving of these conflicts by this Court is required. Petitioner prays that a Writ of Certiorari issue to review the opinion of the Court of Appeals for the Sixth Circuit, entered herein on July 16, 1982.

Respectfully submitted,

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APPENDIX

OPINION OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed July 16, 1982)

No. 81-3250

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOSEPH DURIS,
Plaintiff-Appellant,

v.

ERATO SHIPPING, INCORPORATED; JAPAN LINE LIMITED; REGENT BOTAN SHIPPING, INC.; PALLAS SHIPPING AGENCY, LTD.,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Northern District of Ohio.

Before: KENNEDY and MARTIN, *Circuit Judges;* and DUMBAULD, *Senior District Judge.**

BOYCE F. MARTIN, JR., *Circuit Judge.* Joseph Duris appeals the dismissal of his personal injury action. The District Court dismissed Duris' claim for failure to establish in personam jurisdiction over the defendant Pallas Shipping Agency, Inc.

*Honorable Edward Dumbauld, Senior Judge, United States District Court for the Western District of Pennsylvania, sitting by designation.

Duris was injured in May, 1975 while working as a longshoreman on a vessel in the Port of Toledo, Ohio. He originally tried to sue Erato Shipping, the vessel's dry boat charter. Erato Shipping was subsequently merged into the present defendant, Pallas Shipping.

On appeal, Pallas argues that the District Court properly dismissed Duris' complaint because Pallas, as distinct from Erato, has never had sufficient business contacts in Ohio to bring it within the reach of that state's long arm jurisdictional statute.[1] In the alternative, Pallas contends that Duris' action is time barred by the limitations period of the federal workmen's compensation statute under which he received benefits. We find no merit in either argument and reverse. We will consider Pallas' second, more difficult argument, first.

Shortly after his injury, Duris began to receive benefits under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* Under that statute and its regulations, injured employees receive compensation in one of two forms. If the employer controverts the claim, any benefits are paid pursuant to an award documented in a compensation order. 33 U.S.C. § 914; 20 C.F.R. §§ 702.251-.351 (1981). If, on the other hand, the claim is not contested, compensation is paid voluntarily without an award. 33 U.S.C. § 914, 20 C.F.R. §§ 702.231-242 (1981). It is undisputed that Duris' benefits were paid voluntarily; the Secretary of Labor entered no compensation order or award in this case.

According to section 33 of the Act, if benefits are paid under an award, any claim the employee might have against a third party will be assigned to the employer

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1. Ohio Revised Code § 2307.382.

unless the employee brings his own action within six months of such an award:

> (b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner or Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

33 U.S.C. § 933(b).

This subsection does not appear to cover Duris' claim. The Act, as noted earlier, makes purposeful use of the term "award." Thus, if benefits are paid without an award, there shall be no assignment and no six-month limitation period. Nevertheless, at least one court has held that the mere receipt of compensation benefits constitutes an "award" and so triggers section 33. *Larson v. Associated Container Transport (Australia)*. 459 F. Supp. 561 (E.D.Va. 1978). Similarly, the Fourth Circuit has held that the routine filing of the documents which must accompany even benefits paid without an award are sufficient ratification and acceptance to constitute a formal award. *Liberty Mutual Insurance Co. v. Ameta & Co.*, 564 F.2d 1097 (4th Cir. 1977). On the basis of this authority, Pallas argues that Duris' acceptance of compensation in May, 1975 triggered section 33 and its short statute of limitations, which expired prior to the 1977 commencement of this action. With all respect, we decline to follow *Liberty Mutual* and *Larson*.

Those cases' rationale for ignoring the narrow assignment embodied in section 33 is that unless the assignment provision is read broadly to include every longshoreman's

claim, the many claims paid without an award will never be assigned to the employer. This result, the argument continues, is inequitable because without the assignment, the employer, or its subrogee insurance carrier, cannot seek reimbursement from any negligent third party. Thus, to protect itself, the employer would needlessly controvert every claim in order to gain a formal award and hence the opportunity for an assignment. Unless remedied by a broad interpretation of section 33, these non-disputes will increase costs while slowing payments to injured employees. *See Liberty Mutual, supra,* at 1103.

This fear is unfounded. Employers are not dependent upon the employee's claim for reimbursement purposes. In *Federal Marine Terminals v. Burnside Shipping Co.,* 394 U.S. 404 (1969), the Supreme Court held that the employer's remedy under section 33 is not exclusive. Instead, in the typical situation where a stevedoring contractor, the employer, seeks reimbursement from a negligent shipowner, federal maritime law would permit a tort action in the employer's own right for breach of the shipowner's duty of due care:

> We must also reject the implication of the Court of Appeals' opinion that under federal maritime law the shipowner owed the stevedoring contractor no duties whose breach would give rise to a direct action for damages.
>
> As we held in Kermarec v. Compagnie Generale Transatlantique, 358 US 625, 632, 3 L Ed 2d 550, 555, 79 S Ct 406, "the owner of a ship in navigable waters owes to all who are on board for purposes not inimical to his legitimate interests the duty of exercising reasonable care under the circumstances of each case." That duty of due care imposed by law extends to the stevedoring company as well as to others lawfully on

> the ship, and its breach gives rise to a cause of action for any damages proximately caused. It is not disputed, for example, that if the ship owner's negligence caused damages to the stevedoring contract's equipment, those damages would be recoverable in a direct action sounding in tort. We can see no reason why the shipowner's liability does not in like fashion extend to the foreseeable obligations of the stevedoring contractor for compensation payments to the representative of a longshoreman whose death was occasioned by the shipowner's breach of his duty to the stevedoring contractor.

Id. at 414-415. *See also Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981).

Furthermore, we believe that a broad interpretation of section 33 would vitiate the policy behind its narrowly precise language. Congress might well have sought to assign away an employee's claim only in those cases where the injured longshoreman is likely to be cognizant of the statutory assignment. Although not strictly an election of remedies, the loss of one's personal injury action through an assignment is not without potentially substantial consequences. Once the assignment has been effected, the employee loses all control over the action. Should the employer decide not to sue, the claim will expire. *Rodriguez v. Compass Shipping Co., Ltd.*, 451 U.S. 596 (1981). Unwilling employees should not suffer this consequence. Indeed, the "award" language was added to the statute in 1938 to prevent exactly that ocurrence.[2] H. R. Rep.

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2. The United States Employment Compensation Commission was the moving force behind this amendment. Lewis Dalby, chief counsel for the Commission, made the following comments at the July 31, 1935 House of Representatives Subcommittee hearing on H.R. 8293:

(Continued on following page)

No. 1945, 75th Cong., 3d Sess. 9; *Rodriguez, supra*, at 605. Prior to 1938, assignment occurred immediately upon the acceptance of compensation. Appellee's position would return the Act to its pre-1938 form with the single added protection of a six-month period in which the employee, who has done no more than passively accept benefits, may or may not learn of the impending loss of his claim.

In contrast, where a claim has been paid pursuant to an award, the employe, by virtue of the claim's contravention, is likely to have been brought into sufficient contact with the statute so as to ensure some cognizance of the assignment provision. Thereafter, the employee can make an informed decision. If his employer, or its insurance carrier, appears willing to maintain the action, he may allow the right to pass, knowing that the employer is entitled to recover fully on his claim. This, perhaps, is the favored result in light of the employer's greater ability to maintain a legal action. Alternatively, the employee

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Footnote continued—

> The only remaining section, section 10, relates to the provision of section 33, which provides that the acceptance of compensation by an injured employee shall work an assignment of his right against a third party who has caused his injury. Undoubtedly, very often employees accept compensation without realizing that effect upon their rights. So that the purpose of this is to make the assignment of the right of action arise only when compensation is accepted on an award made by the deputy commissioner. In other words, when the injury occurs, the mere fact that the employer or insurance carrier hurries up and sends a payment around, which is accepted, without knowing that that would take away the entire right, which may be very valuable, that assignment would not arise in such a case, but only if the case had gone to the deputy commissioner and had been formally heard and an award issued, so that there would be opportunity for the injured man, or those acting for him or as beneficiaries, to find out the effect of such an acceptance of compensation before taking it.

Proposed Amendments to the Longshoremen's and Harbor Workers' Compensation Act: Hearings on H.R. 8293 before the Subcomm. on the Judiciary, 74th Cong., 1st Cong., 1st Sess. (1935).

will realize that he must act rather quickly or risk losing the right to control the action altogether.

In rebuttal, appellees argue that an informed decision on the employee's part is not critical because in any instance where the injury can be traced to a negligent third party, the employer's interest in recovering the compensation paid will simultaneously protect the rights of the employee. Furthermore, the Act provides an additional incentive by allowing the employer to keep twenty percent of any recovery over the costs of litigation and all compensation due. 33 U.S.C. § 933(d). Given these inducements and the greater resources of the employer, a broad interpretation of section 33 will benefit both the employer and the employee.

This analysis loses its appeal, however, if we consider the very real threat of conflicting interests between employer and employee.

As noted earlier, the most likely third party tortfeasor will be the vessel's owner or charterer, the owner or lessee of the longshoreman's workplace. On the other hand, the employer-assignee is by definition a stevedoring contractor whose clients are those very same shipowners or charterers. The juxtaposing of this stevedore-client relationship between the employee and the tortfeasor presents obvious disincentives to the bringing of the employee's action by the employer. If the employer-assignee depends to any significant degree upon the shipowner or charterer for future business, the probability that it will enforce the rights of its injured employee against the third-party client is reduced. Nor will the likely imposition of the employer's carrier-subrogee between it and the third-party client alleviate the conflict. The insurance company can hardly ignore the business relationships of its

own clients. This conflict of interest problem makes us hesitate to countenance any interpretation of the Act which would expand the assignment provisions of section 33. If in fact the employer is unlikely to vindicate the rights of the employee, an assignment becomes increasingly similar to the harsher legal doctrine of election of remedies. Such a substantive reinterpretation of the statute lies far beyond the power of this court.

We will not, therefore, read section 33 to encompass all claims paid under the Act. Where, as here, the injured employee has merely accepted compensation payments, no assignment occurs and the third-party claim does not expire in six months. The Second Circuit gave due consideration to the policy against unwitting assignments and reached a similar conclusion. *Rodriguez v. Compass Shipping Co., Ltd.*, 617 F.2d 955 (1980), *aff'd on other grounds*, 451 U.S. 596 (1981).

Our holding today is that the mere receipt of compensation benefits under the Act does not trigger the assignment provision of section 33(b). Hence Duris' claim is not time barred. *See generally Dunbar v. Retla Steamship Co.*, 484 F.Supp. 1308 (E.D.Penn. 1980).

The second question is quickly resolved. In its order, the court below concluded that service of process against Pallas Shipping was improper because that company had never done any business in Ohio. Requiring Pallas to submit to suit in Ohio would, in the court's opinion, offend the constitutional notions of fair play set out in *International Shoe v. Washington*, 326 U.S. 310 (1945).

This ruling was erroneous. Although Pallas Shipping has never had any business contacts in Ohio, its constituent corporation, Erato Shipping, clearly has. No one disputes that Erato was the bareboat charterer of the vessel upon

which Duris was injured and that Erato subsequently merged with Pallas. In this diversity action we are bound to apply Ohio law. *Poyner v. Erma Werke Gmbh*, 618 F.2d 1186, 1187 (6th Cir.), *cert. denied sub nom. Insurance Co. of North America v. Poyner*, 449 U.S. 84 (1980). That law clearly states that after a merger, the surviving corporation is liable for all claims against the constituent corporation:

> When a merger of consolidation becomes effective:
>
> The surviving or new corporation is liable for all obligations of each constituent corporation, including liabilities of defending shareholders. Any claim existing or action or proceeding pending, by or against any constituent corporation, may be prosecuted to judgment, with right of Appeal, if such merger or consolidation had not taken place, or the surviving or new corporation may be substituted in its place.

Ohio Revised Code § 1701.82(A).

Thus, pursuant to this statute, if Duris can establish Ohio contacts sufficient to gain jurisdiction over Erato Shipping, he may thereby gain jurisdiction over Pallas Shipping. Any other ruling would allow corporations to immunize themselves by formalistically changing their titles.

The judgment is reversed and remanded for proceedings consistent with this opinion.

Office - Supreme Court
FILED
JAN 17 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-502

In the Supreme Court of the United States

October Term, 1982

PALLAS SHIPPING AGENCY, LTD.,
Petitioner,

vs.

JOSEPH DURIS,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOINT APPENDIX

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Petition for Certiorari Filed September 28, 1982
Certiorari Granted November 15, 1982

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No. C 80-77

In the United States District Court

FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

JOSEPH DURIS,
Plaintiff,

vs.

ERATO SHIPPING, INC.,
THE INTERNATIONAL TRUST COMPANY OF LIBERIA,

and

PALLAS SHIPPING AGENCY, LTD.,
THE INTERNATIONAL TRUST COMPANY OF LIBERIA,

and

JAPAN LINE LIMITED,

and

REGENT BOTAN SHIPPING, INC.,
Defendants.

RELEVANT DOCKET ENTRIES

4/ 8/80	4	*AMENDED COMPLAINT* with jury demand and request for production of documents filed.
7/25/80	6	MOTION by deft. Pallas to Quash and to Dismiss filed. Mld.
8/ 6/80	7	OPPOSITION of pltf. to motion of deft. Pallas to quash and dismiss fld. Mld.

8/18/80		MOTION and ORDER granting deft. Pallas to 8/29/80 to file a reply brief to pltf's. opposition to motion to quash and dismiss filed. NJW. Copies 77(d) to: Gallagher and Denny.
8/26/80	8	Reply brief of Pallas in support of motion to quash and dismiss filed. Mld.
3/25/81	11	OPINION and ORDER filed. NJW. Motion of deft. Pallas to dismiss granted. Motions for default and stay are overruled. Cause dismissed without prejudice. Copies 77(d) to: Gallagher and Denny.
3/25/81	12	JUDGMENT ON DECISION BY THE COURT filed. NJW. Case dismissed without prejudice. True copies to: Gallagher and Denny.

No. C 80-77

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

(Title Omitted in Printing)

AMENDED COMPLAINT, DEMAND FOR JURY, REQUEST FOR PRODUCTION OF DOCUMENTS

(Filed April 8, 1980)

FIRST CAUSE OF ACTION

Now comes the plaintiff Joseph Duris, by and through counsel and for his cause of action herein alleges and avers as follows:

1. Plaintiff is a citizen and resident of the City of Toledo, State of Ohio, United States of America; that he was severely injured while in the course of his duties as a longshoreman employed by the Toledo Overseas Terminal, Inc., a subsidiary of the Edward J. DeBartolo Corporation, and was so employed at said corporation's Toledo, Ohio waterfront facilities on May 19, 1979.

2. Defendant Erato Shipping, Inc. is a business organization organized and existing under and by virtue of the laws of Liberia.

3. Defendant Japan Line Limited is a business organization organized and existing under and by virtue of the laws of Japan.

4. Defendant Regent Botan Shipping, Inc. is a business organization organized and existing under and by virtue of the laws of Panama.

5. That by reason of the diversity of citizenship by and between the parties hereto, and that the damages are in excess of $10,000.00 this Honorable Court has jurisdiction of the action herein.

6. That this action is timely commenced and within the period of time so prescribed by the laws of the State of Ohio by virtue of Section 2305.15, commonly referred to as the "Savings Clause", which provides that the applicable statute of limitations for a cause of action does not begin to run and does not run during times in which defendants, as is the situation in the present case, are out of the state, or have absconded, or have concealed themselves from the plaintiff abovementioned.

7. That this Court has personal jurisdiction over the person of the defendants herein by virtue of Ohio Revised Code Section 2307.382, which provides such powers,

in part, over any person acting directly or as an agent in transacting business in this state or causing tortious injury by an act or omission in this state.

8. That plaintiff originally commenced an action against Regent Botan Shipping Company of Panama which action was filed as Case Number C 77-171 on April 12, 1977; that service of process upon said defendant could not be obtained with all due diligence and that this Court in an Order of August 9, 1977 granted plaintiff until August 31, 1977 to show why said action should not be dismissed for want of prosecution; that plaintiff, through counsel, on August 26, 1977 filed a Response to Motion to Show Cause upon the grounds that said defendant's address could not be found, and that plaintiff believed that the attorneys representing said defendant would make an appearance but failed to do so; that plaintiff then attempted service upon the then defendant, Regent Botan Shipping Company through the U.S. Marshall in Hong Kong on August 25, 1977; that plaintiff on October 4, 1977 filed a Motion for Extension of Time for Service on the grounds that U.S. Marshall's office advised plaintiff's attorneys that a delay of several months could occur before a return of service was received from Hong Kong; that on October 5, 1977 this Motion was approved and said extension was so ordered; that plaintiff filed a Motion for Service by Publication on January 23, 1978 along with plaintiff's counsel's affidavit of unknown residency of defendant; that service by publication was received by this Court in a Notice of January 24, 1978; that attorneys for the defendant on March 27, 1978 filed a Motion to Quash Service by Publication and to dismiss complaint for lack of in personam jurisdiction, accompanied by a Memorandum; that on April 17, 1978 this Honorable Court dismissed the abovementioned action without prejudice to the plaintiffs; that plaintiff again filed suit in this Honorable Court on May 17, 1978 against the

defendants herein, in addition to Asian Shipping, Limited and Toko Kaiun Kabushiki Kaisha, both of Japan, which case was filed as Case Number C 78-218, as well as the appropriate U.S. Marshall's Service Process Receipt and return for each of the defendants therein and that service upon defendant Erato Shipping, Inc. was not perfected, in that the Marshall was unable to locate said defendant at that time; that the defendants to said action were given until September 25, 1978 to file their answer, move, or otherwise plead by Court Order filed July 25, 1978; that plaintiff's counsel on August 14, 1978 filed with this Court an Affidavit of Unknown Residency of the Defendant Erato Shipping, Inc.; that defendants Japan Line Limited, Asian Shipping Limited, and Toko Kaiun Kabushiki Kaisha filed a Motion to Dismiss the plaintiff's complaint as to each of them on September 13, 1978; that plaintiff was given until November 10, 1978 in which to respond to the defendant's aforementioned Motion to Dismiss by stipulation of parties and order of this Court filed on October 17, 1978; that this Court ordered again by stipulation of parties that plaintiffs be granted until February 9, 1979 in which to respond to defendant's aforementioned Motion to Dismiss, which order was filed on November 14, 1978; that said cause was transferred from the Honorable Judge Don Young's docket to the docket of the Honorable Judge Nicholas Walinski by Order filed December 6, 1978; that plaintiff filed a Motion for Service by Publication on December 14, 1978 against defendant Erato Shipping, Inc. which Motion was so ordered; that plaintiff filed Written Interrogatories and a Request for Production with this Court on December 28, 1978 and certified that a copy of same had been mailed that same day to Attorney Douglas R. Denny of Cleveland, Ohio, attorney for the defendant Japan Line Limited; that the U.S. Marshall returned plaintiff's service on defendant Erato Shipping, Inc. with legal evidence of service by

registered mail in care of Shinwa Kaiun K.K., Matsumoto Building, I, Kyo Bashi, I-Chome, Chuo-Ku, Tokyo, Japan on December 29, 1978; that the U.S. Marshall returned plaintiff's service on defendant Erato Shipping, Inc. with legal evidence of service in care of the Secretary of the State of Ohio, Corporations Department on December 18, 1978; that the U.S. Marshall returned plaintiff's service on defendant Erato Shipping, Inc. with legal evidence of service in care of Erato Shipping, Inc., 1 World Trade Center, Suite 2855, New York, New York 10048 on February 1, 1979; that plaintiff's counsel filed its Motion in Opposition to Defendant's Motion to Dismiss and Supporting Memorandum on February 9, 1979; that defendants Japan Line Limited, Asian Shipping Limited and Toko Kaiun Kabusiki Kaisha filed a Motion for Leave to File Reply Brief on February 20, 1979, which leave was ordered February 20, 1979; that said Case Number C 78-218 was dismissed by this Honorable Court on March 30, 1979; that plaintiff filed a Motion for Reconsideration of the case and Supporting Memorandum on April 4, 1979; that this Court in an Order of April 19, 1979 reinstated the case docketed as Case Number C 78-218; that a Brief of Amicus Curiae and Affidavit and Motion for Leave to File Brief of Amicus Curiae with Brief attached of Attorney Douglas Denny was filed in this Court on April 26, 1979 and such Motion was Ordered by the Court; that plaintiff filed a Motion for Leave to File Reply Brief on May 11, 1979 and that said Motion was so ordered on May 14, 1979; that plaintiff did file a Reply Brief on May 29, 1979; that this Honorable Court again dismissed this case, docketed as Case Number C 78-218 on June 20, 1979; that plaintiff filed a Motion to Reconsider and Supporting Memorandum with this Court on July 5, 1979 which Motion was overruled on August 2, 1979; that plaintiff through counsel, filed a Notice of Appeal with this Court on August 31, 1979; that in response

Attorney Douglas R. Denny filed a Motion for Leave to Appear as Amicus Curiae and Motion to Dismiss Appeal on September 13, 1979 to which the plaintiff filed a Motion in Opposition to Amicus Curiae's Motion to Dismiss Appeal on October 2, 1979; plaintiff subsequently and through counsel moved for a Voluntary Dismissal of Appeal on November 5, 1979, which dismissal was granted by this Honorable Court in an Order filed November 8, 1979.

9. Further, the plaintiff Joseph Duris states that on or about the 19th day of May, 1975, while pursuing his duties as a harbor worker, he sustained injuries aboard the vessel Regent Botan in the Port of Toledo, Lucas County, Ohio, which vessel was owned and operated by the Regent Botan Shipping Company, and at that time leased to the defendant Erato Shipping, Inc. on a bareboat charter; that defendant Erato Shipping, Inc. was merged into Pallas Shipping Agency, Ltd. on or about November 16, 1977, which corporation then and there assumed all assets and liabilities of said Erato Shipping, Inc., including the claim stated herein, and also that at the time of the accident to Mr. Duris, the M/V Regent Botan was leased by Erato Shipping, Inc. to defendant Japan Line Limited under the formality of a time charter.

10. That the injuries sustained by plaintiff were due directly and proximately to the negligence of the defendants in maintaining the companion ways, ladders, and other instrumentalities of said vessel in a negligent fashion, when the defendants knew, or in the exercise of ordinary care, should have known that the plaintiff and others similarly situated would be required to pass over, through, and upon said appurtenances.

11. The plaintiff further states that as a direct and proximate result of the negligence of the defendants, he fell from a negligently maintained ladder and suffered injuries

to his back, and permanent injuries to his left ankle, foot, and leg, requiring extended hospitalization; that he has incurred expenses for hospital, medical, medicinal and related care in the approximate sum of $5,000.00; that he will continue to incur medical and related expenses in an amount which cannot now be determined nor in the exercise of reasonable diligence be ascertained at this time; that he has incurred a loss of earnings and has sustained a permanent impairment of his earning capacity; that he continues to suffer from pain, shock, nervous reaction and inconvenience with all of the foregoing to his damages in the sum of ONE MILLION DOLLARS ($1,000,000.00).

WHEREFORE, plaintiff prays judgment against the defendants in the sum of ONE MILLION DOLLARS ($1,000,000.00) and for his costs of Court herein.

SECOND CAUSE OF ACTION

12. Now comes the plaintiff and for his Second Cause of Action incorporates herein all of the allegations of the First Cause of Action as if the same were fully rewritten and further states that the defendant Erato Shipping, Inc was at all times pertinent a bareboat charterer of the vessel M/V Regent Botan by virtue of an agreement dated December 25, 1972 by and between Erato Shipping, Inc. and the owner of the vessel the defendant Regent Botan Shipping Company, a copy of which is attached hereto and marked as Exhibit "A". Further, plaintiff states that defendant Erato Shipping, Inc. incurs all liability for tortious acts and omissions upon the vessel Regent Botan by virtue of its status as bareboat charterer.

13. That on or about the 16th day of November, 1977, the defendant Erato Shipping, Inc. was merged into Pallas Shipping Agency, Ltd., and that as a result of said merger the defendant Pallas Shipping Agency, Ltd. assumed all

assets and liabilities of the defendant Erato Shipping, Inc., including the plaintiff's claim stated herein.

14. Plaintiff states further that as the bareboat charterer of said vessel the defendant Erato Shipping, Inc. by and through its agents and employees, did conduct negligent activity in the state of Ohio which proximately caused injury to the plaintiff as aforesaid and that such conduct rendered said vessel unseaworthy, which negligence the defendant Pallas Shipping Agency, Ltd. assumes by virtue of the merger described hereinabove.

15. The plaintiff further states that as a direct and proximate result of the negligence of the defendant Erato Shipping, Inc., and Pallas Shipping Agency, Ltd., he fell from a negligently maintained ladder and suffered injuries to his back, and permanent injuries to his left ankle, foot, and leg, requiring extended hospitalization; that he has incurred expenses for hospital, medical, medicinal, and related care in the approximate sum of $5,000.00; that he will continue to incur medical and related expenses in an amount which cannot now be determined nor in the exercise of reasonable diligence be ascertained at this time; that he has incurred a loss of earnings and has sustained a permanent impairment of his earning capacity; that he continues to suffer from pain, shock, nervous reaction and inconvenience with all of the foregoing to his damages in the sum of ONE MILLION DOLLARS ($1,000,000.00).

16. That the course of events established hereinabove in paragraph eight clearly establish that plaintiff, by and through counsel, has been persistent and diligent in pursuing his claims against the abovenamed defendant, and that he has to this point been unsuccessful only by virtue of the nature of the defendant corporations which will be further explained hereinafter and that said defendants

have absconded, and otherwise concealed themselves so as to avoid service by plaintiff and therefore the statute of limitations is tolled as to these defendants.

WHEREFORE, plaintiff Joseph Duris prays judgment against the defendants Erato Shipping, Inc. and Pallas Shipping Agency, Ltd. in the sum of ONE MILLION DOLLARS ($1,000,000.00) in comparative damages, and TWO MILLION DOLLARS ($2,000,000.00) in punitive damages, and for his costs and disbursements herein.

THIRD CAUSE OF ACTION

17. Now comes the plaintiff and for his Third Cause of Action incorporates herein all of the allegations of the First and Second Causes of Action as if the same were fully rewritten herein and further states that defendant Japan Lines Limited at all times pertinent, although listed as a time charterer in an agreement between defendant Erato Shipping, Inc., and Japan Lines Limited, was in actuality the bareboat charterer of the vessel M/V Regent Botan; said document (a copy of which is attached hereto and marked as Exhibit "B") having been executed and entered into on December 25, 1972, the same date and for the same period of time as the supposed bareboat charter between defendants Regent Botan and Erato Shipping, Inc.

18. Further, plaintiff states that defendant Japan Lines Limited incurs all liability for tortious acts and omissions upon the vessel Regent Botan by virtue of its status as bareboat charterer.

19. Further, plaintiff states that defendant Japan Lines Limited also incurs all liability for the aforementioned tortious acts and omissions upon the vessel Regent Botan by virtue of the fact that its status as a time

charterer of said vessel was established by fraud, deception, and in the unconscionable interest of creating a false corporate layer in an attempt to defraud creditors and claimants, including individuals in plaintiff's position; that defendant Japan Lines Limited fraudulently created and/or enlisted the support of the defendant Erato Shipping, Inc. as a sham corporation; that defendant Erato Shipping, Inc. is and was not properly created and capitalized in recognition of the applicable laws of incorporation and that defendant Japan Lines Limited was fully aware of this situation; that officers and directors of the abovementioned defendants created conflicts of interest in clear breach of their fiduciary duties with the aims of defrauding creditors and claimants and unlawfully escaping liability; as a consequence of the foregoing that defendant Japan Lines Limited stands in the stead of defendant Erato Shipping, Inc.; that in actuality defendant Japan Lines Limited is the effective bareboat charterer of the vessel Regent Botan and as such is fully liable to plaintiff Joseph Duris for injuries he sustained upon said vessel.

20. Plaintiff states further that as the bareboat charterer of said vessel the defendant Japan Lines Limited, by and through its agents and employees, did conduct negligent activity in the State of Ohio which proximately caused injury to the plaintiff as aforesaid and that such conduct rendered said vessel unseaworthy.

21. The plaintiff further states that as a direct and proximate result of the negligence of the defendant Japan Lines Limited, he fell from a negligently maintained ladder and suffered injuries to his back, and permanent injuries to his left ankle, foot, and leg, requiring extended hospitalization; that he has incurred expenses for hospital, medical, medicinal and related care in the approximate sum

of $5,000.00; that he will continue to incur medical and related expenses in an amount which cannot now be determined nor in the exercise of reasonable diligence be ascertained at this time; that he has incurred a loss of earnings and has sustained a permanent impairment of his earning capacity; that he continues to suffer from pain, shock, nervous reaction and inconvenience with all of the foregoing to his damages in the sum of ONE MILLION DOLLARS ($1,000,000.00).

22. That the course of events established hereinabove in paragraph eight clearly establish that plaintiff, by and through counsel, has been persistent and diligent in pursuing his claims against the abovenamed defendants, and that he has to this point been unsuccessful only by virtue of the fraudulent and sham transactions referred to hereinabove, and also by the defendant Japan Lines Limited's fraud and misrepresentation of its capacity as a true party liable for tortious acts and omissions upon the vessel Regent Botan.

WHEREFORE, plaintiff Joseph Duris prays judgment against the defendant Japan Lines Limited in the sum of ONE MILLION DOLLARS ($1,000,000.00) in comparative damages, and TWO MILLION DOLLARS ($2,000,000.00) in punitive damages, and for his costs and disbursements herein.

FOURTH CAUSE OF ACTION

23. Now comes the plaintiff and for his Fourth Cause of Action incorporates herein all of the allegations of the First, Second, and Third Causes of Action as if the same were fully rewritten herein, and further states that defendant Regent Botan at all times pertinent was and is the registered owner of the M/V Regent Botan and at the time of the injury to plaintiff as aforesaid stand in the position

of true owner and/or bareboat charterer and as such is responsible for the tortious conduct as alleged hereinabove, and as such has had sufficient activity within this State to allow service upon this defendant.

24. Plaintiff respectfully submits that defendant Regent Botan at all times pertinent remains in the position of owner of the vessel M/V Regent Botan and as such owner incurs liability for the tortious acts of its agents, employees, etc., as aforementioned and that the bareboat charter allegedly entered between Regent Botan and Erato Shipping, Inc. was a sham created to shield the defendant Regent Botan Shipping Company from liability in such cases as is presented herein.

25. Further plaintiff states that defendant Regent Botan Shipping Company incurs all liability for tortious acts and omissions upon the vessel Regent Botan by virtue of its status as bareboat charterer and/or owner.

26. Further, plaintiff states that defendant Regent Botan Shipping Company also incurs all liability for the aforementioned tortious acts and omissions upon the vessel Regent Botan by virtue of the fact that its status as a grantor of bareboat charter of said vessel was established by fraud, deception, and in the unconscionable interest of creating a false corporate layer in an attempt to defraud creditors and claimants, including individuals in plaintiff's position; that defendant Regent Botan Shipping Company fraudulently created and/or enlisted the support of the defendant Erato Shipping, Inc. as a sham corporation, that defendant Erato Shipping, Inc. is and was not properly created and capitalized in recognition of the applicable laws of incorporation and that defendant Regent Botan Shipping Company was fully aware of this situation; that officers and directors of the abovementioned defendants

created conflicts of interest in clear breach of their fiduciary duties with the aims of defrauding creditors and claimants and unlawfully escaping liability; as a consequence of the foregoing that defendant Regent Botan Shipping Company stands in the stead of defendant Erato Shipping, Inc.; that in actuality defendant Regent Botan Shipping Company is the effected owner/bareboat charterer of the vessel Regent Botan and as such is fully liable to plaintiff Joseph Duris for injuries he sustained upon said vessel.

27. Plaintiff states further that as the bareboat charterer/owner of said vessel the defendant Regent Botan Shipping Company, by and through its agents and employees, did conduct negligent activity in the State of Ohio which proximately caused injury to the plaintiff as aforesaid and that such conduct rendered said vessel unseaworthy and unsafe.

28. The plaintiff further states that as a direct and proximate result of the negligence of the defendant Regent Botan Shipping Company, he fell from a negligently maintained ladder and suffered injuries to his back, and permanent injuries to his left ankle, foot, and leg, requiring extended hospitalization; that he has incurred expenses for hospital, medical, medicinal and related care in the approximate sum of $5,000.00; that he will continue to incur medical related expenses in an amount which cannot now be determined nor in the exercise of reasonable diligence be ascertained at this time; that he has incurred a loss of earnings and has sustained a permanent impairment of his earning capacity; that he continues to suffer from pain, shock, nervous reaction and inconvenience with all of the foregoing to his damages in the sum of ONE MILLION DOLLARS ($1,000,000.00).

29. That the course of events established hereinabove in paragraph eight clearly establish that plaintiff, by and through counsel, has been persistent and diligent in pursuing his claims against the abovenamed defendants, and that he has to this point been unsuccessful only by virtue of the fraudulent and sham transactions referred to hereinabove, and also by the defendant Regent Botan Shipping Company's fraud and misrepresentation of its capacity as a true party liable for tortious acts and omissions upon the vessel Regent Botan.

WHEREFORE, plaintiff Joseph Duris prays judgment against these defendants in the sum of ONE MILLION DOLLARS ($1,000,000.00) in comparative damages, and TWO MILLION DOLLARS ($2,000,000.00) in punitive damages, and for his costs and disbursements herein.

Respectfully submitted,

FRANK W. CUBBON, JR., & ASSOC. COMPANY, L.P.A.
By /s/ THOMAS W. GALLAGHER
Attorney for Plaintiff

DEMAND FOR JURY

Now comes the plaintiff and hereby requests a trial by a jury on all issues triable of right herein.

Respectfully submitted,

FRANK W. CUBBON, JR., & ASSOC. COMPANY, L.P.A.
By /s/ THOMAS W. GALLAGHER
Attorney for Plaintiff

REQUEST FOR PRODUCTION OF DOCUMENTS

Now comes the plaintiff by and through his attorney and respectfully requests the defendants to produce copies of any and all insurance policies that may be applicable to the allegations and claims contained within the complaint and requests that said production be made within twenty-eight (28) days from the receipt of this request, pursuant to the Ohio Rules of Civil Procedure.

Also, you are similarly requested to produce copies of any and all statements of the plaintiff or plaintiffs given to you and/or your representatives relative to the allegations and claims contained within this complaint.

Respectfully submitted,

FRANK W. CUBBON, JR., & ASSOC. COMPANY, L.P.A.
By THOMAS W. GALLAGHER
Attorney for Plaintiff

Civil Action No. C80-77

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

(Title Omitted in Printing)

MOTION TO QUASH SERVICE AND TO DISMISS WITH PREJUDICE

(Filed July 25, 1980)

Now comes named defendant Pallas Shipping Agency, Ltd., and moves this Honorable Court for an order quashing the service by mail herein pursuant to Rule 12(b)(5)

of the Federal Rules of Civil Procedure and for an order dismissing the complaint as to it pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure on the grounds that this Court does not have *in personam* jurisdiction in accordance with the reasons set forth in the accompanying memorandum as supported by the attached affidavit of Mr. C. T. Yang, annexed hereto as Exhibit "A".

Alternatively, named defendant Pallas Shipping Agency, Ltd. moves this Honorable Court for an order dismissing plaintiff's complaint as to it, with prejudice, on the ground that it is time barred by the running of the applicable statute of limitation.

RAY, ROBINSON, HANNINEN & CARLE
By /s/ DOUGLAS R. DENNY
1050 Union Commerce Building
Cleveland, Ohio 44115
(216) 861-4533
Attorneys for Defendant Pallas Shipping Agency, Ltd.

SUPPORTING MEMORANDUM

A. DEFENDANT PALLAS SHIPPING AGENCY, LTD. IS NOT SUBJECT TO LONG-ARM MAIL SERVICE, AND ACCORDINGLY THE ATTEMPTED SERVICE UPON IT SHOULD BE QUASHED AND PLAINTIFF'S COMPLAINT DISMISSED AS TO IT FOR WANT OF IN PERSONAM JURISDICTION

The docket in this case will reflect that on April 7, 1980, counsel for plaintiff served a motion for leave to file an amended complaint by which a new defendant was named, namely Pallas Shipping Agency, Ltd. Although the Court has not ruled formally upon said motion, for

the purposes of the present motion defendant Pallas Shipping Agency, Ltd. assumes that the amendment of plaintiff's complaint will be permitted by the Court.

Subsequent to the filing of said motion to amend the complaint, plaintiff caused to be served by mail a copy of the amended complaint upon Pallas Shipping Agency, Ltd. through its corporate agent, the International Trust Company of Liberia.

As indicated in Paragraph 7 of said amended complaint, plaintiff presumably has alleged jurisdiction over defendant Pallas Shipping Agency, Ltd. and attempted service upon Pallas pursuant to Rule 4.3(A) of the Ohio Rules of Civil Procedure, commonly known as the "long-arm" statute.

The Due Process clause of the Fourteenth Amendment of the United States Constitution requires a determination that a foreign corporation has certain minimum contacts with Ohio, such that it is fair that a foreign defendant defend a suit brought in Ohio and that substantial justice is done. *Wainscott v. St. Louis-San Francisco Railway,* 47 Ohio St.2d 133 (1976). In the *Wainscott* case, it was held that a foreign railroad corporation having no contracts in Ohio and maintaining two offices in this state for soliciting freight traffic to be carried over out-of-state rail lines, did not have the necessary minimum contacts with Ohio to make it fair for the corporation to defend a suit within this state.

In a long line of cases stemming from the landmark decision of the U.S. Supreme Court in *International Shoe Co. v. Washington,* 326 U.S. 310 (1945), it has been consistently held that a foreign defendant must have certain minimum contacts within the territory of the forum such that maintenance of suit against the foreign defendant

does not offend what was then termed "traditional notions of fair play and substantial justice." See *In-Flight Devices Corporation v. Van Dusen Air, Inc.*, 466 F.2d 220 (6th Cir., 1972), for this Circuit's interpretation and application of Ohio's long-arm statute.

As evident by the affidavit of the president of Pallas Shipping Agency, Ltd., sworn to before the American Vice Consul at Hong Kong and attached to this motion as Exhibit "A", the named defendant, Pallas Shipping Agency, Ltd., has never had any contact with the State of Ohio. Accordingly, the attempted service upon Pallas Shipping Agency, Ltd. should be quashed and the complaint dismissed as to it for lack of *in personam* jurisdiction.

B. PLAINTIFF'S CLAIM IS TIME BARRED

Defendant Pallas Shipping Agency, Ltd. moves this Court to dismiss plaintiff's complaint, with prejudice, as to it on the grounds that the amended complaint is time barred. In support of this motion, defendant Pallas Shipping Agency, Ltd. relies upon the arguments advanced in support of the identical motion which is currently pending before this Court on behalf of defendant Japan Line Ltd. Said argument and law is contained in said defendant Japan Line's memorandum in support of motion to dismiss and in its reply memorandum in support of said motion to dismiss.

C. CONCLUSION

Service pursuant to the Ohio long-arm statute upon defendant Pallas Shipping Agency, Ltd. was improper and accordingly should be quashed and plaintiff's amended complaint dismissed as to it. Alternatively, plaintiff's amended complaint should be dismissed with prejudice as

to defendant Pallas Shipping Agency, Ltd. since it is time barred.

Respectfully submitted,

RAY, ROBINSON, HANNINEN & CARLE
By /s/ DOUGLAS R. DENNY
Attorneys for Defendant Pallas Shipping Agency, Ltd.

(Certificate of Service Omitted in Printing)

EXHIBIT A

Consulate General of the)
United States of America) SS:
at Hong Kong)

AFFIDAVIT

C. T. Yang, being first duly sworn, deposes and says:

I am C. T. Yang, President of Pallas Shipping Agency, Ltd. I am a citizen of Hong Kong.

Pallas Shipping Agency, Ltd. is a Liberian corporation of which I am 50 per cent shareholder. The company's Articles of Incorporation were filed with Ministry of Foreign Affairs of Liberia on March 18, 1977. Pallas Shipping Agency, Ltd. maintains its principal place of business in Hong Kong. The company does not maintain an office or place of business in the United States.

Pallas Shipping Agency, Ltd. is not licensed to conduct business in the State of Ohio, U.S.A.

Pallas Shipping Agency, Ltd. has, since its inception, never conducted or transacted any business within the State of Ohio, U.S.A.

Pallas Shipping Agency, Ltd. has no agents, employees, representatives, independent contractors, real estate, personal property, offices, equipment, bank accounts, obligations, or assets in the State of Ohio, U.S.A.

Pallas Shipping Agency, Ltd. never shipped goods through Ohio, never entered into a contract in Ohio, never solicited business in Ohio, and has never had any connection or contact with the State of Ohio, U.S.A. whatsoever.

Further affiant sayeth naught.

/s/ C.T. YANG
C.T. YANG

Sworn to before me this 27th day of June, 1980.

/s/ KEITH POWELL II
KEITH POWELL II
American Vice Consul

[Seal]

No. C80-77

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

(Title Omitted in Printing)

PLAINTIFF'S MOTION IN OPPOSITION TO DEFENDANT PALLAS SHIPPING AGENCY, LTD'S MOTION TO QUASH SERVICE AND TO DISMISS WITH PREJUDICE

(Filed August 6, 1980)

Now comes the plaintiff, Joseph Duris, and moves this Honorable Court for an order denying defendant

Pallas Shipping Agency, LTD's Motion to Quash Service and to Dismiss With Prejudice on the grounds that Pallas Shipping Agency, LTD has assumed both the assets and liabilities of defendant Erato Shipping, Inc., and that defendant Pallas Shipping Agency, LTD is subject to long arm mail service, and that plaintiff's claim herein is not barred by the statute of limitations.

Respectfully submitted,

FRANK W. CUBBON, JR., & ASSOCIATES COMPANY, L.P.A.
By /s/ THOMAS W. GALLAGHER
Attorney for Plaintiff

MEMORANDUM

A. Defendant Pallas Shipping Agency, LTD has assumed both the assets and liabilities of defendant, Erato Shipping, Inc., and as such is subject to long arm mail service and that plaintiff's Complaint should not be dismissed.

The plaintiff herein, by and through counsel, was advised on April 3, 1980 by Patrick L. Farrell, of the Liberian Corporation Services, Inc., that Erato Shipping, Inc. was merged into Pallas Shipping Agency, LTD, effective November 16, 1977. (Such advisement is attached hereto as "Exhibit A") On April 7, 1980 counsel for the plaintiff served a Motion for Leave to File an Amended Complaint adding Pallas Shipping Agency, LTD as a defendant in the action presently before this Court.

On July 24, 1980, counsel for the defendant Pallas Shipping Agency, LTD, filed a Motion to Quash Service, wherein it was alleged that Pallas Shipping Agency, LTD could not be subjected to long arm mail service in that the

minimum contacts with the State of Ohio required by Rule 4.3(a) had not been met.

The plaintiff respectfully contends that the defendant, Pallas Shipping Agency, LTD, is properly subjected to long arm mail service, and that defendant Pallas Shipping Agency, LTD is in error, for the reasons more fully set forth hereinafter.

Volume 19 Amjur 2d Section 1554, states as follows:

> "Generally speaking, where a corporation succeeds to the assets of another corporation by virtue of consolidation or merger and not by way of purchase, the new or resulting corporation is liable for the debts and contracts of the other corporation, although there is no statute imposing liability and no agreement assuming it. Corporations cannot by consolidation escape the obligation to pay debts incurred before the consolidation or defeat the right of their creditors to subject their property to the satisfaction of such debt. It is immaterial that such liabilities are unliquidated.
>
> The liability of a consolidated corporation or one to which another corporation has been merged, upon the debts and contracts of the predecessor corporation is governed by statute in some states. The statutes quite generally provide that the new corporation *shall be liable* for the debts and contracts of the predecessor.
>
> Some statutes, in providing for consolidation or a merger, declare that such transactions shall be without prejudice to creditors of any one of the corporations. Such a statute is held to give a creditor no rights by virtue of the merger or consolidation to proceed against the successor corporation where no liability is imposed upon it. His remedy is against his debtor by execution on any judgment obtained, against

the property of such debtor, whether or not it is in the possession of the successor corporation." (emphasis added)

Consistent with the above ALR annotation, those Ohio and Liberian statutory provisions clearly state that the successor corporations are responsible for the assets, as well as the *liabilities* of consolidated, or merged corporations.

The Ohio Revised Code Section 1701.82(A)(b) provides the following:

"When a merger or consolidation becomes effective:

The surviving or new corporation is liable for all obligations of each constituent corporation, including liabilities to defending shareholders. Any claim existing, or action or proceeding pending, by or against any constituent corporation, may be prosecuted to judgment, with right of appeal, as if such merger or consolidation had not taken place, or the surviving or new corporation may be substituted in its place."

The Liberian code of laws revised, of 1976, Section 10.4(2)(a)(b)(c) is as follows:

"When such merger or consolidation has been effected:

(a) Such surviving or consolidated corporation shall thereafter consistently with its articles of incorporation as altered or established by the merger or consolidation, possess all the rights, privileges, immunities, powers and purposes of the constituent corporation.

(b) All the property, real and personal including subscriptions to shares, causes of action and every

other asset of each of the constituent corporations, shall vest in such surviving or consolidated corporation without further acts or deed.

(c) The surviving or consolidated corporation shall assume and be liable for all the liabilities, obligations and penalties of each of the constituent corporations. No liability or obligation due or to become due, claim or demand in any cause existing against any such corporation, or any shareholder, officer or director thereof, shall be released or impaired by such merger or consolidation. No action or proceeding, whether civil or criminal, then pending by or against any such constituent corporation, or any shareholder, officer or director thereof, shall abate or be discontinued by such merger or consolidation, but may be in force, prosecuted, settled or compromised as if such merger or consolidation had not occurred, and such surviving or consolidated corporation may be substituted in such action or special proceeding in place of any constituent corporation."

As is apparent from all of the above, that in the November 16, 1977 merger of Erato Shipping, Inc. to Pallas Shipping Agency, LTD, Erato Shipping, Inc. carried with it not only its assets, but its liabilities, and that Pallas Shipping Agency, LTD has assumed both, as a matter of law. It is also apparent that as Pallas Shipping Agency, LTD assumed the privileges of Erato Shipping, Inc., it too assumed the necessary minimum contact with the State of Ohio which Erato Shipping had unquestionably made thus allowing long arm service. Erato Shipping, Inc, by merging with Pallas Shipping Agency, LTD, gave to Pallas Shipping Agency LTD its liabilities, and in particular, this cause of action, subject to the hereinabove described applicable statutory provisions. As such, the plaintiff herein respectfully submits that Pallas Shipping

Agency, LTD was and is properly subjected to long arm mail service, and accordingly, such service should not be quashed. Further, plaintiff respectfully contends that for all of the above, his Complaint should not be dismissed.

B. Plaintiff's claim herein is not barred by the statute of limitations:

The defendant Pallas Shipping Agency, LTD suggests in its memorandum in support of its Motion to Dismiss that "Section 2305.15 of the Ohio Revised Code does not apply to nonresident corporate defendants who are amenable to process during the period of the running of the statute of limitations." (At page 3) This contention is in direct opposition to the unequivocal language of the Court of Appeals for Hamilton County, Ohio, in *Sheer v. Air-Shields, Inc.*, 61 O.App. 2d 205 (1979), Motion to Certify Record overruled by Supreme Court of Ohio, ... O.St. ..... (1979). In the *Sheer* case, the Court cited both *Seeley v. Expert, Inc.* 26 O.St. 2d 61 (1971) and *Durham v. Anka Research Ltd.*, unreported, No. C-88454, First Appellate District, decided on October 25, 1978, holding that "Under the plain and unequivocal wording of the 'Savings Clause' (Revised Code Section 2305.15), tolling is caused by the absence of the defendant from the state, not by its non-amenability to long arm surface." (61 O.App. 2d at 207) In this case, the defendant was a nonresident corporation which the Court found to be within the scope of Section 2305.15 of the Ohio Revised Code, even though the Court found that it was amenable to process by the long arm statute of throughout.

Applying the foregoing to the instant case, plaintiff respectfully suggests that the defendant has absolutely no merit in its assertion that Section 2305.15 does not apply, but rather this Section clearly does apply to toll the statute of limitations while the defendant corporation is absent

from Ohio, even though it has been amenable to service by virtue of long arm statutes. Thus, plaintiff is well within the statute of limitations for commencing this action.

Further, defendant in its memorandum alleges that plaintiff's exclusive remedy in the case at hand is under the longshoreman and harbor worker's compensation act, 33 U.S.C.A. Section 901, *et seq.*, and as such, his claim is barred by the specific provisions of this act. Title 33 U.S.C.A. Section 933(b) requires that a plaintiff commence an action against a third party within six months of acceptance of an award of compensation under the act. However, the defendant makes it clear in his Memorandum that plaintiff has accepted compensation voluntarily and *without* an award.

Although defendant has noted in his brief that some courts have found, under circumstances of specific cases, that informal voluntary payments by an employer constitute an award of benefits in a compensation order, it is clear that such a finding is a result of a subjective test, weighed upon the facts and circumstances of the individual cases, and not capable of determination without a full hearing and presentation of facts and issues. In the case of *Romano v. United States*, 90 F.Supp. 15 (D.C.N.Y. 1950) a longshoreman filed a claim for compensation under the act and as a result of a conference with a claims examiner of the commission, received compensation. The court there held however, "It is clear from the evidence, however, that the compensation was not accepted under an award in a compensation order filed by the deputy commissioner." (at page 16)

In addition to the requirement of a formal award under the Act, the courts have also required that the injured worker not be prejudiced by the assignment of

his claim to his employer after a formal award. Thus, in *Potomac Electric Co. v. Wynn*, 343 F. 2d 295 (App. D.C. 1965) the court refused to bar an injured worker's claim against a third party on the grounds that it had been initiated more than six months after an award, where the injured party's employer refused to prosecute the claim in his stead. The court there held that:

> "Even if the employer-assignee had 'proper motives' or did not abuse a 'fiduciary' duty to the employee in failing to sue the third party, no statutory purpose would be served in precluding the employee from suing . . . The statute is not designed to protect third parties from suit."

It is clear then, that the defendant Pallas Shipping Agency, LTD is not a party intended to be protected by the six month time limit on the longshoreman and harbor worker's compensation act.

CONCLUSION

It is clear that defendant Pallas Shipping Agency, LTD was properly subjected to long arm mail service and that such service should not be quashed, and that their claim is not barred by any statute of limitations or assignment as discussed hereinabove. For the foregoing reasons, plaintiff requests that this Court overrule defendant Pallas Shipping Agency, LTD's Motion for Dismissal in the present lawsuit.

Respectfully submitted,

FRANK W. CUBBON, JR. & ASSOCIATES COMPANY, L.P.A.
By /s/ THOMAS W. GALLAGHER
Attorney for Plaintiff

(Certificate of Service Omitted in Printing)

EXHIBIT A

LIBERIAN CORPORATION SERVICES, INC.

[Addresses Omitted]

Reston, Virginia
April 3, 1980

Thomas W. Gallagher, Esq.
Frank W. Cubbon, Jr. and Associates
Barristers Building
335 North Superior Street
Toledo, Ohio 43604

Re: ERATO SHIPPING, INC.
PALLAS SHIPPING AGENCY, LTD.

Dear Mr. Gallagher:

This is to confirm our recent telephone conversation in response to your letter of April 1, 1980, addressed to the Honorable George E. Cooper, Deputy Commissioner of Maritime Affairs, regarding the above corporations.

In that telephone conversation we relayed to you the advice of our Liberian correspondent, The International Trust Company of Liberia, that:

> ERATO SHIPPING, INC. was merged into PALLAS SHIPPING AGENCY, LTD. effective November 16, 1977. The International Trust Company of Liberia acts as Registered Agent for service of process for both of these corporations pursuant to Section 3.1 of the Liberian Business Corporation Act.

The Trust Company's address is as follows:

The International Trust Company of Liberia
80 Broad Street
P. O. Box 292
Monrovia, Liberia

Service of process on The Trust Company in its capacity as Agent should be directed to the attention of Mr. A. T. Balsden or Mr. G. F. Kummer.

Further to your request, we enclose a copy of the Liberian Business Corporation Act (1977), The Liberian Corporation Law of 1948, and a photocopy of Chapter 3 (Commencement of Action) of Part 1 of Title 1 (Civil Procedure Law) of the Liberian Code of Laws Revised.

We have also advised you that although we act as a correspondent for The Trust Company in some manners, we have no authority to accept a forward service of process on their behalf.

Yours truly,

/s/ PAT FARRELL
PATRICK L. FARRELL
General Counsel

PLF/cp
Enclosures

No. C80-77

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

(Title Omitted in Printing)

MOTION FOR LEAVE TO FILE REPLY BRIEF

(Filed August 18, 1980)

Now comes Pallas Shipping Agency, Ltd. and moves this Honorable Court pursuant to Rule 3(A)4 of the Rules of the United States District Court for the Northern District of Ohio, for leave to file a brief for the reason that plaintiff's motion in opposition to defendant Pallas Shipping Agency's motion to quash service and to dismiss with prejudice contains new matter regarding the merger of defendant Erato Shipping into Pallas Shipping Agency which defendant Pallas Shipping Agency, Ltd. should have a right to distinguish.

Respectfully submitted,

RAY, ROBINSON, HANNINEN & CARLE
By /s/ DOUGLAS R. DENNY
1050 Union Commerce Building
Cleveland, Ohio 44115
(216) 861-4533
Attorneys for Defendant Pallas Shipping Agency, Ltd.

REPLY BRIEF TO BE FILED BY AUGUST 29, 1980.
IT IS SO ORDERED.

/s/ NICHOLAS J. WALINSKI
United States District Judge

In conformity with Rule 77(d) F.R.C.P. please take notice that the following order of judgment was entered in this Court on: August 18, 1980 James S. Gallas, Clerk

No. C80-77

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

(Title Omitted in Printing)

REPLY BRIEF OF PALLAS SHIPPING AGENCY, LTD. IN SUPPORT OF MOTION TO QUASH SERVICE AND TO DISMISS WITH PREJUDICE

(Filed August 26, 1980)

Contrary to movant's position, as supported by affidavit, that it has never had any contact with the State of Ohio, plaintiff still asserts that this Court can maintain *in personam* jurisdiction.

The basis of plaintiff's position is that he was advised by a company known as Liberian Corporation Services, Inc. by letter dated April 3, 1980, that "Erato Shipping, Inc. was merged into Pallas Shipping Agency, Ltd., effective November 16, 1977." This letter indicates that a Liberian bank advised the writer that the alleged merger took place. It is neither sworn to under oath nor otherwise sufficient to establish this. Plaintiff then makes the totally unsupported conclusion:

> ". . . It is also apparent that as Pallas Shipping Agency, Ltd. assumed the privileges of Erato Shipping, Inc., it too assumed the necessary minimum con-

tact with the State of Ohio which Erato Shipping had unquestionably made thus allowing long arm service. . . ." p. 4 of Plaintiff's Brief.

Even assuming arguendo that defendant Erato Shipping, Inc. had the necessary minimum contact with Ohio, there is nothing before the Court to indicate that Pallas Shipping Agency, Ltd., agreed to submit to the Court's jurisdiction. By plaintiff's own admission it wasn't until April 7, 1980 that it served its Motion for Leave to Amend its Complaint adding as a named defendant Pallas Shipping Agency, Ltd. It was almost 2-1/2 years after any agreement between Erato and Pallas that Pallas even was notified of this matter.

A check of the Court dockets, reflects that the first time suit was commenced against Erato Shipping, Inc. was in *Joseph E. Duris v. Japan Line Limited, et al.*, Civil Action No. C78-218, in which the Complaint was filed May 17, 1978. Hence, *even* Erato was unaware of this matter in November, 1977, at the time of the alleged agreement between Erato and Pallas.

Even ---------

Assuming there was a valid corporate merger between Pallas and Erato in November, 1977. . .

Assuming that said merger included Pallas assuming *all* aspects of outstanding liabilities and contingent claims against Erato. . .

Assuming plaintiff's claim against Erato was not time-barred in November, 1977. . .

Assuming Erato is subject to this Court's jurisdiction. . .

Requiring named defendant Pallas Shipping Agency, Ltd. to submit to the jurisdiction of this Court offends even

the most liberal standards of fair play and substantial justice and certainly is not within the jurisdiction encompassed by Ohio's "'Long Arm" statute. See *International Shoe Co. v. State of Washington,* 326 U.S. 310 (1945).

Certainly, Pallas Shipping Agency, Ltd. can claim surprise and surprise is one factor which has been identified as making the assertion of jurisdiction over a non-resident unfair in a given case. *In-Flight Devices Corporation v. Van Dusen Air, Inc.,* 466 F.2d 220, 233 (6th Cir., 1972); see also Currie, "The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois," 1963 Univ. of Illinois L.F. 533, 535.

Plaintiff, upon whom the burden falls, has failed to establish any minimum contacts that Pallas Shipping Agency, Ltd. has with Ohio.

The letter dated April 3, 1980, which plaintiff has attached as Exhibit "A" to his opposing brief states that The International Trust Company of Liberia *acts* as Registered Agent for service of process for Erato Shipping, Inc. pursuant to the Liberian Business Corporation Act. If indeed Erato Shipping, Inc. is subject to long-arm jurisdiction, plaintiff should proceed against it. As plaintiff points out by quoting Section 1701.82(A) of the Ohio Revised Code, even if there was a valid merger, he can still proceed against the constituent corporation, Erato Shipping, Inc., in Ohio [see *Nationwide Ins. Co. v. The New York, Chicago & St. Louis Rd. Co.,* 4 Ohio App. 2d 167 (Sandusky County, 1965)], or he can proceed against the surviving corporation, Pallas Shipping Agency, Ltd., in a forum to whose jurisdiction it is subject.

Conclusion

Pallas Shipping Agency, Ltd. has *never* had contact with the State of Ohio. In November, 1977, neither it nor Erato Shipping, Inc. were aware of plaintiff's claim. Even if a valid merger then took place, requiring Pallas Shipping Agency, Ltd. to submit to *in personam* jurisdiction in Ohio would create unfair surprise well beyond the limits of fundamental fairness as embodied in the concept of due process. Accordingly, and for the reasons previously advanced in its principal brief, named defendant Pallas Shipping Agency, Ltd. renews its Motion to Quash Service and (alternatively) to Dismiss with prejudice.

Respectfully submitted,

RAY, ROBINSON, HANNINEN & CARLE
By /s/ DOUGLAS R. DENNY
1050 Union Commerce Building
Cleveland, Ohio 44115
(216) 861-4533
Attorneys for Defendant Pallas Shipping Agency, Ltd.

NOTICE OF SERVICE

A copy of the foregoing Reply Brief of Pallas Shipping Agency, Ltd. in Support of Motion to Quash Service and to Dismiss with Prejudice was duly mailed on this 25th day of August, 1980 to Thomas W. Gallagher, Esq., or Frank W. Cubbon Jr., and Associates Co., L.P.A., The Barristers Building, 335 North Superior Street, Toledo, Ohio 43604, attorney for plaintiff.

RAY, ROBINSON, HANNINEN & CARLE
By /s/ DOUGLAS R. DENNY
Attorneys for Defendant Pallas Shipping Agency, Ltd.

No. C 80-77

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

JOSEPH DURIS,
Plaintiff,

VS.

ERATO SHIPPING, INC., *et al.*,
Defendants.

OPINION AND ORDER

(Filed March 25, 1981)

WALINSKI, *J*:

This cause is before the Court on Defendant Pallas Shipping Agency, Ltd.'s motion to dismiss, plaintiff's motions for stay of proceedings and for default against Erato Shipping, Inc., and the opposition thereto.

Plaintiff is attempting to institute an action for an injury occurring May 19, 1975, aboard the M/V REGENT BOTAN for the third time. (See C 77-171, C 78-218, and the instant suit.)

Plaintiff brings suit against Erato Shipping, Inc., the bareboat charterer of the M/V REGENT BOTAN, Pallas Shipping Agency, Ltd., the surviving corporation of a merger with Erato on October 27, 1977, Japan Line Limited, a Japanese company, and Regent Botan Shipping, Inc., a Panamanian company.

Regent Botan Shipping, Inc. was not served and is no longer a party. Japan Line Limited was dismissed as a

defendant on October 16, 1980, and is no longer a defendant.

Erato Shipping, Inc. does not exist as an entity, being wholly merged into Pallas Shipping Agency, Ltd. on October 27, 1977. The purported mail service on Erato on March 11, 1980, and May 12, 1980, is ineffective unless it is service on the surviving corporation Pallas Shipping Agency, Ltd., which by the merger document assumed the assets and liabilities of Erato.

Pallas has never done any business in Ohio. It would offend a sense of fair play to allow service in personam on Pallas under Ohio's long arm statute, Ohio Revised Code § 2307.382. The requisite minimum contacts with Ohio are absent.

The purported mail service on Erato and Pallas was had in Monrovia, Liberia through a statutory agent. The absence of Erato and Pallas from the state of Ohio has tolled the statute of limitations. Service on Pallas being improper under Ohio Revised Code § 2307.382, and service on Erato being ineffective,

IT IS ORDERED that the motion to dismiss of Pallas Shipping Agency, Ltd. is well taken.

IT IS FURTHER ORDERED that the motions for default and stay are overruled. There being no remaining defendants, this cause is dismissed without prejudice.

/s/ NICHOLAS J. WALINSKI
United States District Judge

No. C 80-77

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

JOSEPH DURIS

vs.

ERATO SHIPPING, INC., *et al.*

JUDGMENT

(Filed March 25, 1981)

This action came on for hearing before the Court, Honorable NICHOLAS J. WALINSKI, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered.

It is Ordered and Adjudged case dismissed without prejudice.

/s/ NICHOLAS J. WALINSKI
United States District Judge

No. 81-3250

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JOSEPH DURIS,
Plaintiff-Appellant,

v.

ERATO SHIPPING, INCORPORATED; JAPAN LINE LIMITED; REGENT BOTAN SHIPPING, INC.; PALLAS SHIPPING AGENCY, LTD.,
Defendants-Appellees.

OPINION OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed July 16, 1982)

ON APPEAL from the United States District Court for the Northern District of Ohio.

Before: KENNEDY and MARTIN, *Circuit Judges;* and DUMBAULD, *Senior District Judge.**

BOYCE F. MARTIN, JR., *Circuit Judge.* Joseph Duris appeals the dismissal of his personal injury action. The District Court dismissed Duris' claim for failure to establish in personam jurisdiction over the defendant Pallas Shipping Agency, Inc.

Duris was injured in May, 1975 while working as a longshoreman on a vessel in the Port of Toledo, Ohio. He

*Honorable Edward Dumbauld, Senior Judge, United States District Court for the Western District of Pennsylvania, sitting by designation.

originally tried to sue Erato Shipping, the vessel's dry boat charter. Erato Shipping was subsequently merged into the present defendant, Pallas Shipping.

On appeal, Pallas argues that the District Court properly dismissed Duris' complaint because Pallas, as distinct from Erato, has never had sufficient business contacts in Ohio to bring it within the reach of that state's long arm jurisdictional statute.[1] In the alternative, Pallas contends that Duris' action is time barred by the limitations period of the federal workmen's compensation statute under which he received benefits. We find no merit in either argument and reverse. We will consider Pallas' second, more difficult argument, first.

Shortly after his injury, Duris began to receive benefits under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* Under that statute and its regulations, injured employees receive compensation in one of two forms. If the employer controverts the claim, any benefits are paid pursuant to an award documented in a compensation order. 33 U.S.C. § 914; 20 C.F.R. §§ 702.251-.351 (1981). If, on the other hand, the claim is not contested, compensation is paid voluntarily without an award. 33 U.S.C. § 914, 20 C.F.R. §§ 702.231-242 (1981). It is undisputed that Duris' benefits were paid voluntarily; the Secretary of Labor entered no compensation order or award in this case.

According to section 33 of the Act if benefits are paid under an award, any claim the employee might have against a third party will be assigned to the employer unless the employee brings his own action within six months of such an award:

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1. Ohio Revised Code § 2307.382.

> (b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner or Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

33 U.S.C. § 933(b).

This subsection does not appear to cover Duris' claim. The Act, as noted earlier, makes purposeful use of the term "award." Thus, if benefits are paid without an award, there shall be no assignment and no six-month limitation period. Nevertheless, at least one court has held that the mere receipt of compensation benefits constitutes an "award" and so triggers section 33. *Larson v. Associated Container Transport (Australia)*. 459 F. Supp. 561 (E.D.Va. 1978). Similarly, the Fourth Circuit has held that the routine filing of the documents which must accompany even benefits paid without an award are sufficient ratification and acceptance to constitute a formal award. *Liberty Mutual Insurance Co. v. Ameta & Co.*, 564 F.2d 1097 (4th Cir. 1977). On the basis of this authority, Pallas argues that Duris' acceptance of compensation in May, 1975 triggered section 33 and its short statute of limitations, which expired prior to the 1977 commencement of this action. With all respect, we decline to follow *Liberty Mutual* and *Larson*.

Those cases' rationale for ignoring the narrow assignment embodied in section 33 is that unless the assignment provision is read broadly to include every longshoreman's claim, the many claims paid without an award will never be assigned to the employer. This result, the argument continues, is inequitable because without the assignment,

the employer, or its subrogee insurance carrier, cannot seek reimbursement from any negligent third party. Thus, to protect itself, the employer would needlessly controvert every claim in order to gain a formal award and hence the opportunity for an assignment. Unless remedied by a broad interpretation of section 33, these non-disputes will increase costs while slowing payments to injured employees. *See Liberty Mutual, supra,* at 1103.

This fear is unfounded. Employers are not dependent upon the employee's claim for reimbursement purposes. In *Federal Marine Terminals v. Burnside Shipping Co.*, 394 U.S. 404 (1969), the Supreme Court held that the employer's remedy under section 33 is not exclusive. Instead, in the typical situation where a stevedoring contractor, the employer, seeks reimbursement from a negligent shipowner, federal maritime law would permit a tort action in the employer's own right for breach of the shipowner's duty of due care:

> We must also reject the implication of the Court of Appeals' opinion that under federal maritime law the shipowner owed the stevedoring contractor no duties whose breach would give rise to a direct action for damages.
>
> As we held in Kermarec v. Compagnie Generale Transatlantique, 358 US 625, 632, 3 L Ed 2d 550, 555, 79 S Ct 406, "the owner of a ship in navigable waters owes to all who are on board for purposes not inimical to his legitimate interests the duty of exercising reasonable care under the circumstances of each case." That duty of due care imposed by law extends to the stevedoring company as well as to others lawfully on the ship, and its breach gives rise to a cause of action for any damages proximately caused. It is not disputed, for example, that if the ship owner's negligence

> caused damages to the stevedoring contract's equipment, those damages would be recoverable in a direct action sounding in tort. We can see no reason why the shipowner's liability does not in like fashion extend to the foreseeable obligations of the stevedoring contractor for compensation payments to the representative of a longshoreman whose death was occasioned by the shipowner's breach of his duty to the stevedoring contractor.

Id. at 414-415. *See also Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981).

Furthermore, we believe that a broad interpretation of section 33 would vitiate the policy behind its narrowly precise language. Congress might well have sought to assign away an employee's claim only in those cases where the injured longshoreman is likely to be cognizant of the statutory assignment. Although not strictly an election of remedies, the loss of one's personal injury action through an assignment is not without potentially substantial consequences. Once the assignment has been effected, the employee loses all control over the action. Should the employer decide not to sue, the claim will expire. *Rodriguez v. Compass Shipping Co., Ltd.*, 451 U.S. 596 (1981). Unwilling employees should not suffer this consequence. Indeed, the "award" language was added to the statute in 1938 to prevent exactly that occurrence.[2] H. R. Rep.

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2. The United States Employment Compensation Commission was the moving force behind this amendment. Lewis Dalby, chief counsel for the Commission, made the following comments at the July 31, 1935 House of Representatives Subcommittee hearing on H.R. 8293:

> The only remaining section, section 10, relates to the provision of section 33, which provides that the acceptance of compensation by an injured employee shall work an assignment of his right against a third party who has caused his injury. Undoubtedly, very often employees accept com-

(Continued on following page)

No. 1945, 75th Cong., 3d Sess. 9; *Rodriguez, supra,* at 605. Prior to 1938, assignment occurred immediately upon the acceptance of compensation. Appellee's position would return the Act to its pre-1938 form with the single added protection of a six-month period in which the employee, who has done no more than passively accept benefits, may or may not learn of the impending loss of his claim.

In contrast, where a claim has been paid pursuant to an award, the employe, by virtue of the claim's contravention, is likely to have been brought into sufficient contact with the statute so as to ensure some cognizance of the assignment provision. Thereafter, the employee can make an informed decision. If his employer, or its insurance carrier, appears willing to maintain the action, he may allow the right to pass, knowing that the employer is entitled to recover fully on his claim. This, perhaps, is the favored result in light of the employer's greater ability to maintain a legal action. Alternatively, the employee will realize that he must act rather quickly or risk losing the right to control the action altogether.

In rebuttal, appellees argue that an informed decision on the employee's part is not critical because in any in-

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Footnote continued—

> pensation without realizing that effect upon their rights. So that the purpose of this is to make the assignment of the right of action arise only when compensation is accepted on an award made by the deputy commissioner. In other words, when the injury occurs, the mere fact that the employer or insurance carrier hurries up and sends a payment around, which is accepted, without knowing that that would take away the entire right, which may be very valuable, that assignment would not arise in such a case, but only if the case had gone to the deputy commissioner and had been formally heard and an award issued, so that there would be opportunity for the injured man, or those acting for him or as beneficiaries, to find out the effect of such an acceptance of compensation before taking it.

Proposed Amendments to the Longshoremen's and Harbor Workers' Compensation Act: Hearings on H.R. 8293 before the Subcomm. on the Judiciary, 74th Cong., 1st Cong., 1st Sess. (1935).

stance where the injury can be traced to a negligent third party, the employer's interest in recovering the compensation paid will simultaneously protect the rights of the employee. Furthermore, the Act provides an additional incentive by allowing the employer to keep twenty percent of any recovery over the costs of litigation and all compensation due. 33 U.S.C. § 933(d). Given these inducements and the greater resources of the employer, a broad interpretation of section 33 will benefit both the employer and the employee.

This analysis loses its appeal, however, if we consider the very real threat of conflicting interests between employer and employee.

As noted earlier, the most likely third-party tortfeasor will be the vessel's owner or charterer, the owner or lessee of the longshoreman's workplace. On the other hand, the employer-assignee is by definition a stevedoring contractor whose clients are those very same shipowners or charterers. The juxtaposing of this stevedore-client relationship between the employee and the tortfeasor presents obvious disincentives to the bringing of the employee's action by the employer. If the employer-assignee depends to any significant degree upon the shipowner or charterer for future business, the probability that it will enforce the rights of its injured employee against the third-party client is reduced. Nor will the likely imposition of the employer's carrier-subrogee between it and the third-party client alleviate the conflict. The insurance company can hardly ignore the business relationships of its own clients. This conflict of interest problem makes us hesitate to countenance any interpretation of the Act which would expand the assignment provisions of section 33. If in fact the employer is unlikely to vindicate the rights of the employee, an assignment becomes increas-

ingly similar to the harsher legal doctrine of election of remedies. Such a substantive reinterpretation of the statute lies far beyond the power of this court.

We will not, therefore, read section 33 to encompass all claims paid under the Act. Where, as here, the injured employee has merely accepted compensation payments, no assignment occurs and the third-party claim does not expire in six months. The Second Circuit gave due consideration to the policy against unwitting assignments and reached a similar conclusion. *Rodriguez v. Compass Shipping Co., Ltd.*, 617 F.2d 955 (1980), *aff'd on other grounds*, 451 U.S. 596 (1981).

Our holding today is that the mere receipt of compensation benefits under the Act does not trigger the assignment provision of section 33(b). Hence Duris' claim is not time barred. *See generally Dunbar v. Retla Steamship Co.*, 484 F.Supp. 1308 (E.D.Penn. 1980).

The second question is quickly resolved. In its order, the court below concluded that service of process against Pallas Shipping was improper because that company had never done any business in Ohio. Requiring Pallas to submit to suit in Ohio would, in the court's opinion, offend the constitutional notions of fair play set out in *International Shoe v. Washington*, 326 U.S. 310 (1945).

This ruling was erroneous. Although Pallas Shipping has never had any business contacts in Ohio, its constituent corporation, Erato Shipping clearly has. No one disputes that Erato was the bareboat charterer of the vessel upon which Duris was injured and that Erato subsequently merged with Pallas. In this diversity action we are bound to apply Ohio law. *Poyner v. Erma Werke Gmbh*, 618 F.2d 1186, 1187 (6th Cir.), *cert. denied sub nom. Insurance Co. of North America v. Poyner*, 449 U.S. 84 (1980). That

law clearly states that after a merger, the surviving corporation is liable for all claims against the constituent corporation:

> When a merger of consolidation becomes effective:
>
> The surviving or new corporation is liable for all obligations of each constituent corporation, including liabilities of defending shareholders. Any claim existing or action or proceeding pending, by or against any constituent corporation, may be prosecuted to judgment, with right of Appeal, if such merger or consolidation had not taken place, or the surviving or new corporation may be substituted in its place.

Ohio Revised Code § 1701.82(A).

Thus, pursuant to this statute, if Duris can establish Ohio contacts sufficient to gain jurisdiction over Erato Shipping, he may thereby gain jurisdiction over Pallas Shipping. Any other ruling would allow corporations to immunize themselves by formalistically changing their titles.

The judgment is reversed and remanded for proceedings consistent with this opinion.

OMB No. 44-R0001

U.S. DEPARTMENT OF LABOR EMPLOYMENT STANDARDS ADMINISTRATION OFFICE OF WORKMEN'S COMPENSATION PROGRAMS	PAYMENT OF COMPENSATION WITHOUT AWARD	OWCP CASE NUMBER
LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, AS EXTENDED		CASE FILE NUMBER 211-52 3002

NOTE: *This notice is to be filed with the Deputy Commissioner when the first payment is made. A copy should be sent to the person to whom compensation was paid.*

1. NAME OF INJURED PERSON (First, middle, last)
Joseph E. Duris

2. ADDRESS OF INJURED PERSON (Number, street, city, state and zip code)
1207½ Nevada Street Toledo, Ohio

3. DATE OF ACCIDENT OR FIRST ILLNESS (Month, day, year)
May 19, 1975

4. DATE DISABILITY BEGAN (Month, day, year)
May 19, 1975

5. NAME OF INJURED OR DEPENDENTS OF INJURED, TO WHOM COMPENSATION WILL BE PAID
Joseph E. Duris

6.
AVERAGE WEEKLY WAGE $ 99.00 MULTIPLIED BY 2/3 = COMPENSATION RATE $ 66.57
(Enter if maximum rate is being paid) 74.57

7. COMPENSATION WILL BE PAID FROM (Month, day, year) 5-20-75
Compensation in the amount of $149.14 will be paid every two weeks.
UNTIL NOTICE IS GIVEN THAT PAYMENT HAS BEEN STOPPED OR SUSPENDED

10. DATE OF FIRST PAYMENT (Month, day, year)
First payment will be paid June 2,1975 to cover 5-20-75 through 6-2-75

11. MEDICAL CARE AND TREATMENT HAS BEEN ☒ HAS NOT BEEN ☐ PROVIDED BY A PHYSICIAN OR HOSPITAL CHOSEN BY INJURED PERSON (Check appropriate box).

12. NAME OF EMPLOYER
Edward J. DeCartolo Corp., Toledo Overseas Terminal, Inc.

13. ADDRESS OF EMPLOYER (Number, street, city, state and zip code)
3319 St. Lawrence Drive
Toledo, Ohio 43605

14. NAME OF INSURANCE CARRIER
Seaboard Fire & Marine - Underwriters Adjusting Company

15. AUTHORIZED SIGNATURE
Allan R. Lacy X_____

16. TITLE OF PERSON WHOSE SIGNATURE APPEARS IN ITEM 15	17. DATE SIGNED
Claims Adjuster	06-02-75

GPO 888-849

For sale by the Superintendent of Documents, U.S. Government Printing Office
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Form LS-206
(Rev. 9/73)

AFFIDAVIT OF DOUGLAS R. DENNY

STATE OF OHIO)
)
CUYAHOGA COUNTY)

DOUGLAS R. DENNY, being first duly sworn, deposes and says:

I am one of the attorneys for defendant Japan Line Limited in Civil Action No. C80-77, pending in the United States District Court for the Northern District of Ohio, Western Division.

On March 12, 1980, I was advised by telephone that Form LS-208 was filed in the compensation claim of Joseph Duris on April 26, 1977. The party advising me was Mr. Harold Levinson, who is a hearing examiner with the Department of Labor in Chicago, Illinois. Mr. Levinson checked his records and advised that Mr. Duris's file, No. 9-4012, showed a filing of said Form LS-208 on April 26, 1977.

Further affiant sayeth naught

/s/ DOUGLAS R. DENNY

Sworn to before me and subscribed in my presence on this 13 day of March, 1980.

/s/ DAVID M. SPOTTS
Notary Public

David M. Spotts, Attorney At Law, Notary Public-State of Ohio. My commission has no expiration date. Section 147.03 R. C.

Office-Supreme Court, U.S.
FILED
OCT 20 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-502

In the Supreme Court of the United States

October Term, 1982

PALLAS SHIPPING AGENCY, LTD.,
Petitioner,

vs.

JOSEPH DURIS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the decision of the Sixth Circuit Court of Appeals that the mere receipt of compensation benefits under the Longshoreman's and Harbor Workers' Compensation Act, 33 U.S.C. 901, *et seq.*, does not trigger the assignment provision of section 933(b), warrants review by this court, particularly where there does not exist a clear conflict between the decision of Circuit Courts of Appeal with each other and with this Court?

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Form SL-206 (Payment of Compensation Without Award) A1

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF CASE

Respondent defers to Petitioner's Statement of the Case, except to add the following:

On June 2, 1975, thirteen days after Respondent sustained injuries on a foreign vessel, a claims adjuster for Respondent's employer issued a form entitled "Payment

of Compensation Without Award", a copy of which was served upon Respondent, and a copy of which is attached hereto. See Respondent's Appendix, A1.

The exact holding of the Sixth Circuit Court of Appeals, on the issue of whether or not an "award" had been made to Joseph Duris, Respondent herein, pursuant to the Longshoreman and Harbor Worker's Compensation Act, 33 U.S.C. 901, *et seq.*, is, "Our holding today is that the mere receipt of compensation benefits under the Act does not trigger the assignment provision of section 33(b). Hence, Duris' claim is not time barred." *Duris v. Erato Shipping, Inc.*, No. 81-3250, slip op. at 7 (6th Cir., Jul. 16, 1982) (Petitioner's Appendix, p. A8).

SUMMARY OF ARGUMENTS

A. The Sixth Circuit's decision was based solely on the facts before it and said facts are distinguishable from similar matters in other jurisdictions.

B. The Second Circuit has recently interpreted 33 U.S.C. 933(b). This interpretation is the result of a logical progression of interpretive theories and clearly defines 33 U.S.C. 933(b) and is consistent with the decision of the Sixth Circuit Court of Appeals in the case at bar.

C. The present matter is not special and important and therefore, does not warrant review.

REASONS FOR DENYING CERTIORARI

A. THE SIXTH CIRCUIT IS NOT IN CONFLICT WITH OTHER CIRCUIT COURTS, OR THIS COURT, IN ITS CONSTRUCTION OF 33 U.S.C. 933(b).

The proper construction of The Longshoreman and Harbor Worker's Compensation Act, 33 U.S.C. 901, *et seq.* ("Act"), and in particular, section 933(b), has been judicially debated since at least 1947. Two predominant questions have been repeatedly tendered. The first, is the time at which an assignment of benefits from an injured longshoreman to his or her employer occurs; and the second issue, from which Petitioner's Petition for Writ of Certiorari principally arises, is what constitutes an "award of benefits" within the meaning of section 933(b) of the Act.

Petitioner ultimately would have this Court hold that the mere receipt of compensation benefits constitutes an award in a compensation order and thereafter causes an assignment of all right to pursue an action against a third party unless the injured longeshoreman commences his or her action against such third party within six months after receipt of such compensation benefits. In order to accomplish that goal Petitioner requests this Court to hold that the decision of the Sixth Circuit Court of Appeals is in conflict with other similarly situated courts, as well as with this Court.

The Sixth Circuit Court of Appeals held:

> Where, as here, the injured employee has merely accepted compensation payments, no assignment occurs and the third party claim does not expire in

six months. The Second Circuit gave due consideration to the policy against unwilling assignments and reached a similar conclusion. *Rodriguez v. Compass Shipping Co., Ltd.*, 617 F.2d 955 (1980), *aff'd. on other grounds*, 451 U.S. 596 (1981).

Our holding today is that mere receipt of compensation benefits under the Act does not trigger the assignment provision of section 33(b). Hence Duris' claim is not time barred. *See generally Dunbar v. Retla Steamship Co.*, 484 F. Supp. 1308 (E.D. Penn. 1980). *Duris v. Erato Shipping, Inc.*, No. 81-3250, slip op. at 7 (6th Cir., Jul. 16, 1982) (Petitioner's Appendix, p. A8).

It is respectfully submitted that the Sixth Circuit decision in the case at bar is not in conflict with other Circuit Appellate Court decisions and those cases cited by the Petitioner will be discussed hereinafter. Also, we submit that the Sixth Circuit decision in *Duris* is not in conflict with this Court's decision in *Rodriguez, supra*, as Petitioner alleges, for the reason shown above by the Sixth Circuit Court of Appeals, as well as for additional reasons cited hereinafter. In point, it is the Respondent's contention that the decision of the Sixth Circuit in the instant case is consistent with the holdings of this and other courts in like circumstances.

1. This Court considered the ramifications of accepting compensation benefits under the Act in *American Stevedores, Inc. v. Porello*, 330 U.S. 446 (1947). Respondent, Porello, suffered injuries while working as an employee of the Petitioner on a public vessel of the United States. Two weeks after sustaining the injuries, Porello began receiving compensation benefits from the Petitioner's insurance carrier, without the compulsion of an award

by a deputy commissioner. (At no time did American Stevedores, Inc. controvert the right of Porello to receive said compensation benefits.) The matter came to this Court on two issues, one which is not pertinent to the present case, and the second being whether or not Porello, by his acceptance of benefits, lost his right to sue the third party tortfeasor. This Court held, at page 455 of its opinion, "It is quite clear that the mere acceptance of compensation is not the kind of election for which provision is made by §33(a) of the Act, which provides for notice of intention to the deputy commissioner, so the argument is technically defective." Later in the decision, this Court added,

> "The apparent purpose of the Act is to provide payments during the period while the employee is unable to earn, when they are sorely needed, without compelling him to give up his right to sue a third party when he is least fit to make a judgment of election. For these reasons we think that mere acceptance of compensation payments does not preclude an injured employee from thereafter electing to sue a third party tortfeasor." *American Stevedores, Inc.*, 330 U.S. at 456.

In arriving at the decision, this Court stated, "Surely the Act was never intended and has never been held to provide that after acceptance of compensation, and until an award, neither employer nor employee could sue the third-party tortfeasor." *American Stevedores, Inc.*, 330 U.S. at 455. Consideration of this Court's holding in its entirety, with particular emphasis on the latter offered quotation, justifies the inference that this Court does not equate the acceptance of compensation benefits with an "award", as the term is used in section 933(b) of the Act.

Respondent respectfully submits that the decision of the Sixth Circuit Court of Appeals, in *Duris*, is consistent with this Court's holding in *American Stevedores, Inc., id.* Judge Martin, writing for the unanimous Sixth Circuit, held, "Our holding today is that the mere receipt of compensation benefits under the Act does not trigger the assignment provision of section 33(b)." *Duris v. Erato Shipping, Inc.*, No. 81-3250, slip op. at 7 (Petitioner's Appendix, A1, A8). Just as this Court demanded something more than the mere receipt of benefits to trigger the assignment provisions discussed in section 933(a) of the Act, the *Duris* Court demanded something more than the mere receipt of compensation benefits to effect an assignment under section 933(b). It is submitted that the *Duris* holding consistently and correctly applied the dictates of *American Stevedores, Inc., supra* at p. 4.

2. Petitioner alleges that the Sixth Circuit's decision conflicts with the Fourth Circuit Court of Appeals. In *Liberty Mutual Insurance Company v. Ameta & Company*, 564 F.2d 1097 (4th Cir., 1977), the Fourth Circuit ruled, ". . . an award under a compensation order does not require formal entry of an award *per se*. Rather, the focus should properly be upon some act of ratification of compensation, whether formal or informal, and the subsequent acceptance of compensation by the claimant." *Liberty Mutual Insurance Company*, 564 F.2d, at 1102. When applying its rule to the attendant facts, the Fourth Circuit Court held that sufficient affirmative action had occurred to constitute labeling the benefits received as an "award". The Sixth Circuit's decision, in *Duris, supra* at p. 4, is not contrary to the Fourth Circuit's rule. The different dispositions of the two cases are a result of dissimilar material facts. In *Duris*, the present Respondent was served with Form SL-206, entitled "Pay-

ment of Compensation *Without Award*" (emphasis supplied) and Form SL-208, entitled "Compensation Payment Stopped or Suspended." A review of the facts presented in *Liberty Mutual Insurance Company, id.* reflects that the claimant was given considerably more reason, via formal notice, to be aware of the effect of the monies provided to him by his employer so as to constitute "ratification of compensation." The Sixth Circuit was presented with different facts than was the *Liberty* Court and Respondent submits that it was these factual differences which resulted in the respective dispositions of each case, and not a conflict in the decisions of the Appellate Courts involved.

3. In support of its argument alleging a conflict, Petitioner mentions *Larson v. Associated Container Transportation (Australia) Ltd.*, 459 F. Supp. 561 (E.D. Va., 1978), a District Court case. It is accepted that this Court does not normally consider potential conflicts between Circuit and District Courts, as those within the meaning of Supreme Court Rule 17.1(a), but even though, Respondent suggests that no conflict exists here. *Larson, id.*, is an affirmation of *Liberty Mutual Insurance Co., supra*, at p. 6. *Larson, id.*, makes no attempt to solidify existing law, it merely applies the dictates of *Liberty Mutual Insurance Co., id.*, and disposes of the matter before it accordingly and based on the particular facts regarding that case. By considering the *Larson* Court's disposal procedure and recalling that the Court is a District Court, Respondent submits that no occasion for conflict arises between *Larson, id.* and the present matter.

4. The next chronological case cited by Petitioner to discuss the Act was this Court's decision in *Rodriguez v. Compass Shipping Co., Ltd.*, 451 U.S. 596 (1981). This decision has had a major impact on litigation arising under

the Act and is often quoted. This Court stated, in clear terms, "The only conditions precedent to the statutory assignment are the acceptance of compensation pursuant to an award in a compensation order and the passage of the required period of six months." *Rodriguez*, 451 U.S. at 603. Additionally, and more importantly, this Court stated, in footnote 3, at page 599, that despite arguments relative to whether or not an award, within the meaning of section 933(b), had been made, that ". . . for purposes of our decision, we *assume* that their [*petitioner's*] acceptance of compensation operated as an assignment under §33(b)." (Emphasis supplied). As such, this Court never reached the very issue upon which Petitioner seeks review. Quite obviously, no conflict can arise where the issues were not the same, as was pointed out by the Sixth Circuit Court in their opinion in the case at bar, at page 7 (Petitioner's Appendix, p. A8).

5. Following *Rodriguez, supra* at p. 7, the Second Circuit Court of Appeals next reviewed the meaning of the Act. By holding that "an agreement approved in a Memorandum of Informal Conference by the claims examiner after an informal conference constitutes an 'award in a compensation order' under §933(b)," the Second Circuit affirmed a District Court decision dismissing an injured longshoreman's complaint. *Ambrosino v. Transoceanic Steamship Co.*, 675 F.2d 470 (2d Cir., 1982), Without specifically mentioning, the *Ambrosino* Court applied the rule in *Liberty Mutual Insurance Company, supra* at p. 6, which stated that the "focus should properly be upon some act of ratification of compensation." *Liberty Mutual Insurance Company*, 564 F.2d at 1102. The petitioners in *Ambrosino, supra* had attended an informal conference convened by a United States Department of Labor claims examiner in the Office of Worker's

Compensation Programs. The sheer impact of such a meeting would adequately notify an injured longshoreman of ratification of compensation, much unlike the two forms received by the present Respondent, one of which stated "Payment of Compensation *Without Award.*" (Emphasis supplied). Again, Respondent submits that the case at bar is distinguishable from those offered by Petitioner, and in particular, is distinguishable from *Ambrosino, id.*, and therefore, no conflict arises. Again, Respondent respectfully submits that the different disposition of these cases is directly affected by the very clear presence of differing material facts, i.e. the extent of notice of the Longshoreman of an actual award which would trigger the assignment provisions of section 933(b) of the Act.

Further Respondent submits that the Second Circuit position on interpretation of section 933(b) of the Act is principally the same as the Sixth Circuit in the case at bar and is so shown and further discussed hereinafter at section "B".

6. In chronological order, the final case offered by Petitioner to support its conflict theory, is *Simmons v. Sea-Land Services,* 676 F.2d 106 (4th Cir., 1982). At first glance, it appears that the facts in *Simmons* are much the same as those now presented; longshoremen were injured on the job and each accepted compensation benefits without contravention by their employers. In response to these facts, the *Simmons* Court set forth a test as to when compensation equates an award, pursuant to section 933 (b):

> . . ." an award in a compensation order" is created by the completion of three events: (1) the employer, having not contravened its liability, initiates compensation payments to the longshoreman; (2) the deputy

commissioner files the employer's notice that compensation payments have been initiated; and (3) the longshoreman accepts any of the payments. *Simmons*, 676 F.2d, at 109.

In arriving at this rule, the Fourth Circuit Court of Appeals noted that the essence of an award is "an act of ratification of compensation." *Simmons*, 676 F.2d, at 109, *quoting Liberty Mutual Insurance Co. v. Ameta & Co.*, 564 F.2d 1097, 1102. The Fourth Circuit attempted to incorporate into its general rule this "act of ratification". Although the Sixth Circuit, in its *Duris* holding was not so explicit, it in reality did not depart from other Circuit Court of Appeals' mandates. As previously stated, the *Duris* holding is only that the "mere receipt of compensation benefits under the Act does not trigger the assignment provision of section 33(b)." *Duris*, No. 81-3250, slip op. at 7 (Petitioner's Appendix, p. A8) *supra* at p. 2. The *Duris* Court realized, as did the *Simmons* Court, that something more must occur than the mere receipt of benefits to effect an assignment. The Sixth Circuit decided the case before it on its particular facts; it did not, unlike the Fourth Circuit, delineate a general rule. Even so, the Sixth Circuit's holding, based solely on the facts before it, does not necessarily depart from the rule stated in *Simmons*, *id.* Both courts require something more than the receipt of compensation benefits to effectuate an award. On the facts before it, the *Duris* Court found insufficient ratification to create an "award." After considering the facts before it, the Fourth Circuit found sufficient facts to justify finding an award. The *Duris* court did not necessarily depart from the *Simmons* rule, but found that the attendant facts did not come within it. This poses no conflict of law or rules.

Respondent respectfully suggests, after a review of the foregoing, that no conflict exists between the Sixth Circuit Court of Appeals and any other court of equal or greater jurisdiction. Each case presented by the Petitioner in its Petition for Writ of Certiorari is factually distinguishable from the present matter. The Sixth Circuit has not mandated a rule in conflict with other courts; it merely determined that there were insufficient material facts presented in the *Duris, ibid.*, case to justify finding an "award", within the meaning of 33 U.S.C. 933(b); it did no more. Although it would appear that the Sixth Circuit places greater emphasis upon the statutory language, in particular the word "award," it is respectfully submitted that the Sixth Circuit Court is making it clear that it believes a "broad interpretation of section 33 would vitiate the policy behind its narrowly precise language." *Duris, id.*, p. 7. Although not reciting the exact test elements espoused by another Circuit Court of Appeals, it is expressing its position of taking a strict stance relative to interpreting said statutory language and in applying any such test, whether it be "ratification of compensation" or the "Simmons rule". *Simmons, ibid.*

Although the various Circuit Courts of Appeals may establish their own guidelines or tests for such statutory interpretation, in so doing they are not necessarily setting standards for all other Circuit Courts to adhere to rigidly. Each case presents differing material facts which require judicial flexibility. The exercise of such flexibility accordingly does not create conflicts which would require the intervention of this Court. Respondent respectfully submits that the case at bar is such a case. For that reason; namely, that, in reality, there is no conflict present between the Circuit Court decisions, that the Petition for Writ of Certiorari be denied.

B. THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS IS CONSISTENT WITH AND INDISTINGUISHABLE FROM RECENT HOLDINGS IN THE SECOND CIRCUIT.

In January and April of 1982, the Second Circuit Court of Appeals reviewed the Longshoreman and Harbor Worker's Compensation Act, 33 U.S.C. 901, *et seq.* in *Verderame v. Torm Lines*, 670 F.2d 5 (2d Cir., 1982) and *D'Amico v. Cia De Nav. Mar. Netumar*, 677 F.2d 249 (2d Cir., 1982), respectively. The two cases are factually distinguishable from each other and the present matter; however, the Second Circuit mandated a rational rule which consistently held that an injured longshoreman must know or be given notice that compensation payments will be construed as an "award" under section 933(b) of the Act in order for the assignment provisions to come into effect. Respondent suggests that the Second Circuit's holdings are and should be the applicable law to such matters, that these holdings are the logical outcome of years of litigation and that the Sixth Circuit's decision in *Duris*, *supra* at p. 2, is not conflicting.

The *Verderame*, *supra*, case involved an injured longshoreman who received interim payments under a "Payment of Compensation *Without Award*" (Emphasis added) procedure. Three years later, the petitioner was served with a form entitled "Compensation Order—Award of Compensation". Respondent herein respectfully requests this Court to recall that he, too, received a form entitled "Payment of Compensation *Without Award*". (Emphasis added). The Second Circuit, in reversing the District Court, stated:

> In the first place, the notice of payment expressly stated that it was "without award" which would nor-

> mally preclude its being treated as an "award" as that term is used under §33(b). But regardless of the labels, Verderame at that point did not know how much he would eventually receive by way of insurance compensation and therefore was not sufficiently informed to be able to decide whether a damage suit against the shipowner would be advisable. *Verderame*, 670 F.2d at 7.

The *Verderame* Court, similar to the Sixth Circuit, demanded that something more occur than the receipt of benefits in order to activate the "award" provision of section 933(b). It also, as was the Sixth Circuit Court herein, very concerned that the longshoreman be aware of the circumstances surrounding his situation so as to be able to make a knowledgeable decision.

Similarly, in *D'Amico*, *supra* at p. 12, the Second Circuit, when presented with a situation where a *pro se* longshoreman received interim compensation and then negotiated and agreed to a final settlement, stated, in reversing the district court's dismissal of the longshoreman's complaint:

> It is not clear that Plaintiff knew or can be charged with knowing the legal implications of accepting a final compensation. He was not represented by counsel, and neither the carrier's nor claims examiner's letter contained any reference to the six month limitation period. Moreover, it is not clear from the record that the settlement payment was made "under an award" by the deputy commissioner as provided in §33(b). *D'Amico*, 677 F.2d at 251.

Again, the Second Circuit would not allow the mere acceptance of benefits to trigger the assignment provisions

of 33 U.S.C. 933(b); something more (i.e., notice) was required.

The decisions of the Second Circuit are consistent with the Sixth Circuit. Both Courts have fully considered the plight of the injured longshoreman as well as the well-being of shipowners and their insurers. Respondent respectfully submits that the correct and applicable law defining 33 U.S.C. 933(b) is found in the Second and Sixth Circuits, this recent law is the cumulation of years of litigation, from various Circuits and lays a foundation for the future understanding and application of the provisions of the Act. Further, Respondent submits that the aforementioned information reflects that there is in reality, no conflict between the Circuit Appellate Courts and decisions of this Court.

C. THE SIXTH CIRCUIT COURT OF APPEALS' DECISION DOES NOT WARRANT REVIEW.

It is respectfully submitted that the case at bar, to quote Rule 17.1 of the Supreme Court Rules, does not present "special and important reasons" for the granting of a Writ of Certiorari.

As has been stated hereinabove, the Sixth Circuit based its decision solely on the facts before it. It did not create a general rule of law which will cause consternation between the circuits or for those attempting to interpret 33 U.S.C. 933(b). Only when the exact same facts again arise will the *Duris* Court's decision have applicability. The Court's attention is respectfully directed to *Wisconsin Electric Co. v. Dumore Co.*, 282 U.S. 813 (1931), where it was stated by this Court, "It appearing that the asserted conflict in decisions arises from differences in states of fact, and not in the application of a principle of

law, the Writ of Certiorari is dismissed as improvidently granted."

Additionally, as set forth in part two of this argument, the Second Circuit has recently expressed rules which are consistent with the logical progression of litigation concerning 33 U.S.C. 933(b).

This Court stated in *Magnum Co. v. Coty*, 262 U.S. 159, 163 (1923), "The jurisdiction [of the Supreme Court to review cases by way of Certiorari] was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing. Our experience shows that eighty percent of those who petition for Certiorari do not appreciate the necessary limitations upon our issue of the Writ." Petitioner respectfully suggests that the present Petition for Writ of Certiorari is one of the "eighty percent" which does not warrant review.

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
OFFICE OF WORKMEN'S COMPENSATION PROGRAMS

PAYMENT OF COMPENSATION WITHOUT AWARD

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, AS EXTENDED

OMB No. 44-R0001

1. CASE NUMBER
211-52 3062

NOTE: *This notice is to be filed with the Deputy Commissioner when the first payment is made. A copy should be sent to the person to whom compensation was paid.*

2. NAME OF INJURED PERSON (First, middle, last)
Joseph E. Duris

3. ADDRESS OF INJURED PERSON (Number, street, city, state and zip code)
1207½ Nevada Street Toledo, Ohio

4. DATE OF ACCIDENT OR FIRST ILLNESS (Month, day, year)
May 19, 1975

5. DATE DISABILITY BEGAN (Month, day, year)
May 19, 1975

6. NAME OF INJURED OR DEPENDENTS OF INJURED TO WHOM COMPENSATION WILL BE PAID
Joseph E. Duris

7. AVERAGE WEEKLY WAGE $ 99.00 MULTIPLIED BY 2/3 (If maximum rate is being paid) = COMPENSATION RATE $ 66.57 / 74.57

8. COMPENSATION WILL BE PAID FROM (Month, day, year) 5-20-75
Compensation in the amount of $149.14 will be paid every two weeks.

UNTIL NOTICE IS GIVEN THAT PAYMENT HAS BEEN STOPPED OR SUSPENDED

9. DATE OF FIRST PAYMENT (Month, day, year)
First payment will be paid June 2,1975 to cover 5-20-75 through 6-

10. MEDICAL CARE AND TREATMENT HAS BEEN [X] HAS NOT BEEN [ ] PROVIDED BY A PHYSICIAN OR HOSPITAL CHOSEN BY INJURED PERSON (Check appropriate box).

11. NAME OF EMPLOYER
Edward J. DeCartolo Corp., Toledo Overseas Terminal, Inc.

12. ADDRESS OF EMPLOYER (Number, street, city, state and zip code)
3319 St. Lawrence Drive
Toledo, Ohio 43605

13. NAME OF INSURANCE CARRIER
Seaboard Fire & Marine – Underwriters Adjusting Company

14. AUTHORIZED SIGNATURE
Allan R. Locy X

15. TITLE OF PERSON WHOSE SIGNATURE APPEARS IN ITEM 14
Claims Adjuster

16. DATE SIGNED
06-02-75

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No. 82-502

In the Supreme Court of the United States

October Term, 1982

PALLAS SHIPPING AGENCY, LTD.,
Petitioner,

vs.

JOSEPH DURIS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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FOR THE SIXTH CIRCUIT

SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Joseph Duris, hereby respectfully notifies the Court that on October 12, 1982 it denied certiorari to the matter of *Simmons v. Sea-Land Services*, 676 F.2d 106 (4th Cir., 1982), *cert. denied*, No. 82-56, which was cited on pages 3, 6, 7, 8 and 11 of the Petition for Writ of Cer-

tiorari and on pages 9, 10 and 11 of the Brief in Opposition for Writ of Certiorari.

Respectfully submitted,

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Supreme Court, U.S.
FILED
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BRIEF OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the acceptance by an injured longshoreman of voluntarily paid compensation and the subsequent filing of Form LS-206 and Form LS-208 by his employer with the deputy commissioner, signifying the commencement and termination of payments, triggers the assignment provisions of section 33(b) of the Longshoremen's and Harbor Workers' Compensation Act.
2. Whether, under the circumstances of this case, there is a conflict of interest between the injured longshoreman and his employer which precludes the operation of the assignment provisions of section 33(b) of the Act.

LIST OF ALL PARTIES

Joseph Duris - Plaintiff-Appellant

Erato Shipping, Incorporated;

Japan Line Limited;

Regent Botan Shipping, Inc.;

Pallas Shipping Agency, Ltd. - Defendants-Appellees

Joseph Duris is the Respondent herein. Pallas Shipping Agency, Ltd. is the sole Petitioner herein.

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No. 82-502

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ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF PETITIONER

OPINIONS BELOW

The opinion of the District Court entered on March 24, 1981, is unreported but is reproduced in the Joint Appendix at page 36. The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 684 F.2d 352 and is reproduced in the Joint Appendix at page 39.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The decision of the Court of Appeals for the Sixth Circuit was entered on July 16, 1982. The petition for a writ of certiorari was filed on September 20, 1982, and was granted on November 15, 1982.

STATUTES INVOLVED

The statutes involved are material parts of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1424, 33 U.S.C. § 901, et seq., as amended. Title 33 U.S.C. § 933(a), as amended, provides:

> "If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person."

Title 33 U.S.C. § 933(b), as amended, provides:

> "Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner or Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person *unless such person shall commence an action against such third person within six months after such award.*" (Emphasis supplied.)

STATEMENT OF THE CASE

On February 19, 1980, the respondent filed a complaint alleging personal injuries sustained as a result of an accident which occurred at Toledo, Ohio, on May 19, 1975, while he was working as a longshoreman aboard the M/V Regent Botan. In the complaint the named defendants were Erato Shipping, Inc., the bareboat charterer of the vessel at the time of the alleged injury; Japan Line Limited, the time charterer of the vessel at the time of the alleged injury, and Regent Botan Shipping, Inc., the owner of the vessel at the time of the alleged injury. On April 8, 1980, respondent filed an amended complaint naming Pallas Shipping Agency, Ltd., the survivor corporation of a merger between Erato Shipping, Inc. and Pallas Shipping Agency, Ltd., which took place in Monrovia, Liberia, on October 27, 1977 (Joint App. 36).

On October 10, 1980, the District Court granted the motion to dismiss Japan Line Limited on the ground that, as time charterer, it could not be held liable as a matter of law and the judgment of dismissal was filed on October 16, 1980. On March 25, 1981, the District Court dismissed Regent Botan Shipping, Inc., and Erato Shipping, Inc., on the ground that neither had been properly served. In ruling on the Motion to Quash Service filed by Pallas Shipping Agency, Ltd., the District Court held that it was not subject to service under Ohio's long-arm statute (Joint App. 36, 37). On March 25, 1981, the District Court entered judgment dismissing the action without prejudice (Joint App. 38). The appeal taken by the respondent was confined to the dismissal of Pallas Shipping Agency, Ltd.

On July 16, 1982, the Court below filed its opinion reversing and remanding. It ruled that where the long-

shoreman accepted voluntarily paid compensation benefits, no assignment occurred under section 33(b) of the Longshoremen's and Harbor Workers' Compensation Act and that the longshoreman could gain jurisdiction over a corporation which merged with the corporation which had bareboat chartered the vessel upon which he was injured if he could establish Ohio contacts sufficient to gain jurisdiction over the charterer.

Compensation benefits were voluntarily paid to respondent commencing on June 2, 1975, as indicated by Form LS-206 (Joint App. 48).

The payment of compensation was terminated as indicated by the filing of Form LS-208 with the Department of Labor on April 26, 1977 (Joint App. 49).

The question presented in the petition for writ of certiorari which was filed on September 20, 1982, was confined to the ruling of the Court below on the non-assignment of the cause of action to the respondent's employer. Its ruling on the issue of securing jurisdiction over the petitioner is not before this Court.

Certiorari was granted herein on November 15, 1982.

SUMMARY OF ARGUMENT

The voluntary payment of compensation benefits to the respondent, plus the acceptance and filing by the Bureau of Employees Compensation, U.S. Department of Labor, of Form LS-206 and Form LS-208 constituted an "award in a compensation order" under 33 U.S.C. § 933(b) of the Longshoremen's and Harbor Workers' Compensation Act. The respondent's rights against the petitioner were assigned by operation of law to his employer and the filing of an amended complaint against respondent on April 8, 1980, almost three years after the payment of the last compensation benefit, was beyond the six-month limitation period of 33 U.S.C. § 933(b).

This Court ruled in *Czaplicki v. The Hoegh Silvercloud, et al.*, 351 U.S. 525 (1956), that under the conflict of interest situation which existed in that case there was an exception to the assignment provision in 33 U.S.C. § 933(b) and the longshoreman's suit against the vessel owner and others, after the six-month period, was valid. No such conflict of interest exists here. Even if it be presumed that the employer-assignee would be reluctant to pursue the assigned remedy against the alleged tortfeasor, this is not the type of conflict of interest which vitiates the assignment mandated by the provisions of 33 U.S.C. § 933(b). When Congress enacted the 1959 amendments to this provision of the statute, it had in mind the natural reluctance of the stevedore-employer to sue its customer and the six-month limitation period is controlling unless a conflict of interest as delineated by *Czaplicki* is present.

ARGUMENT

I. THE RULING OF THE COURT BELOW THAT NO ASSIGNMENT OF THE RESPONDENT'S CAUSE OF ACTION AGAINST THE PETITIONER OCCURRED UNDER THE PROVISIONS OF 33 U.S.C. § 933(b) IS ERRONEOUS AND SHOULD BE REVERSED.

(a) The Voluntary Payment of Compensation Benefits to the Respondent, Plus the Acceptance and Filing by the Bureau of Employees Compensation, U.S. Department of Labor, of Form LS-206 and Form LS-208 Constituted an "Award in a Compensation Order" Under 33 U.S.C. § 933(b). The Respondent's Rights Against the Petitioner Were Assigned by Operation of Law to His Employer.

The purpose of the 1959 amendments, as they relate to 33 U.S.C. § 933(b), is set forth in SENATE REPORT 428 [To accompany H.R. 451], 86th Congress, 1st Session, *reprinted in* 1959 U.S. & ADMIN. NEWS, p. 2135. The report states:

> "The bill as amended by the committee would revise section 33 of the act so as to permit an employee to bring a third-party liability suit without forfeiting his right to compensation under the act. The principle underlying the modification of the law made by this bill, is embodied in most modern State workmen's compensation laws. The committee believes that in theory and practice this is a sound approach to what has been a difficult problem. As embodied in the committee amendment, the principle

would be applied with due recognition of the equities and rights of all who are involved.

"Although an employee could receive compensation under the act and for the same injury recover damages in a third-party suit, he would not be entitled to double compensation. The bill, as amended, provides that an employer must be reimbursed for any compensation paid to the employee out of the net proceeds of the recovery. *In the event that an employee does not elect to sue for damages within 6 months of the compensation award the employer is assigned the cause of action.* In the event that the employer institutes proceedings and makes a recovery, the employee receives four-fifths of the amount after necessary expenses, approved by the Deputy Commissioner, and all benefits and compensation have been deducted. *Thus by giving the employer a reasonable (one-fifth) share in the net recovery an incentive is provided not to compromise a suit only for the amount of compensation but to protect the interests of the employees as much as possible.*" (Emphasis supplied.)

In HOUSE REPORT No. 229 [To accompany H.R. 451], 86th Congress, 1st Session, *reprinted in* 1959 U.S. CODE & ADMIN. NEWS, p. 314, it is stated:

"Such a person will be able to commence his remedy at law at any time [within] 6 months after the compensation order or within 9 months after the enactment of any new laws creating, establishing, or affording a new or additional remedy. If the employee or other person entitled to compensation on his behalf receives any funds in a civil action, through settlement, or otherwise, the employer or his insurance carrier will have a lien on such funds to the extent of

the total amount of compensation awarded under, or provided, or estimated, by this act for such case and the expenses for medical treatment.

"Subsection (b) provides that if, in the situation referred to above, the employee or his survivors or legal representatives do not commence action against the third person within the time limit set forth above, the failure will operate to assign the cause of action to the employer or his insurance carrier if the employer or his insurance carrier has given notice to the employee or other person entitled to compensation that his failure to commence action will operate as an assignment of the cause of action. If the employer or his insurance carrier doesn't give such notice until after a date at least 30 days from the last date on which he may commence the action, the period during which he may commence the action will be extended for 30 days after he has received the notice. If he hasn't begun the action by then, his failure will then operate to assign the cause of action to the employer or his insurance carrier."

The Senate, in its REPORT No. 428, *supra*, did not follow HOUSE REPORT 229, *supra*, relating to the obligation of the employer or its insurance carrier to give notice to the employee, at least 30 days from the last date on which he may commence an action against a third party, that the failure to do so will operate as an assignment of the cause of action and that if such notice is not given, it will extend the right to bring the third-party action for 30 days after the notice is received.

In ruling on the issue of the assignment of the respondent's claim under 33 U.S.C. § 933(b), the Court below stated (Joint App. 46):

"We will not, therefore read section 33 to encompass all claims, paid under the Act. Where, as here, the injured employee has merely accepted compensation payments, no assignment occurs and the third party claim does not expire in six months. The Second Circuit gave due consideration to the policy against unwitting assignments and reached a similar conclusion. Rodriguez v. Compass Shipping Co. Ltd., 617 F.2d 955 (1980), aff'd. on other grounds, 451 U.S. 596, 101 S.Ct. 1945, 68 L.Ed.2d 472 (1981).

"Our holding today is that the mere receipt of compensation benefits does not trigger the assignment provisions of section 33(b). Hence Duris' claim is not time barred. See generally Dunbar v. Retla Steamship Co., 484 F.Supp. 1308 (E.D. Penn. 1980)"

The foundation of the above ruling appears to be that before an assignment to the employer can occur there must be "an award in a compensation order" and that this phrase must be strictly construed. The Court below declined to follow the ruling of federal courts, one of which held that the mere receipt of compensation benefits constituted an "award" under the statute, and the other of which ruled that the payment of benefits, plus the filing of documents which must accompany those payments, are sufficient "ratification and acceptance to constitute a formal award." (Joint App. 41).

In the case at bar the voluntary payment of compensation benefits is undisputed. There is nothing in the opinion of the Court below which indicates that any consideration was given to the fact that Form LS-206 and Form LS-208 had been filed with the Bureau of Employees Compensation, Department of Labor. The exclusion of the respondent's claim from the assignment provisions of 33 U.S.C. § 933(b) without consideration of these doc-

uments is erroneous and contrary to persuasive federal authorities.

In *Liberty Mutual Ins. Co. v. Ameta & Co.*, 564 F.2d 1097 (4th Cir. 1977), the insurer of the stevedore-employer brought an action against the shipowner and injured longshoreman who was paid benefits under the Longshoremen's and Harbor Workers' Compensation Act but who also obtained a voluntary settlement from the shipowner whose alleged negligence caused the injury to the longshoreman. The District Court entered judgment in favor of the insurer for $1,000 which represented settlement proceeds but found in favor of the shipowner and longshoreman with respect to the remainder of the insurer's lien. The insurer appealed and the shipowner and longshoreman cross-appealed. In ruling on the assignment provisions of 33 U.S.C. § 933(b), the Court of Appeals stated (p. 1101):

> "The liability of the shipowner to the insurance carrier turns in part upon whether there was an 'award' under the Act. The shipowner contends that since Melson received compensation voluntarily, without a formal award, then under 33 U.S.C. § 933(b), 933(d), and 933(h), there was no assignment to the stevedoring co. and thence to the insurance carrier of Melson's rights against the shipowner to seek recovery for the personal injuries sustained by Melson. The insurance carrier contends: (1) that a formal award is not necessary under the Act - all that is required is payment and acceptance of compensation; (2) that the various documents filed in this case with the Bureau of Employees Compensation, U.S. Department of Labor, collectively constitute an "award" under the Act where the deputy commissioner has received and reviewed them; * * *"

At page 1103 the Court continued:

> "In this case, the numerous documents set forth above in footnote 10 all were duly received, filed and accepted by the deputy commissioner, Bureau of Employees Compensation, U. S. Department of Labor. *Compensation payments were made and thereafter terminated pursuant to these documents. We hold that the documents set forth in footnote 10 above constituted sufficient affirmative action and a determination by the deputy commissioner granting benefits to Melson so as to constitute an "award" of benefits in a compensation order* under 33 U.S.C. § 933(b) *without the entry of a formal award. Melson's rights against third parties were assigned by operation of law to his employer, the stevedoring co., 33 U.S.C. § 933(b), and thereafter subrogated by operation of law to the insurance carrier.* 33 U.S.C. § 933 (h)." (Emphasis supplied.)

The documents referred to in footnote 10 in the above case were as follows (p. 1101):

(a) Form BEC-202 - Employer's First Report of Accident or Occupational Illness;

(b) Form BEC-206 - Payment of Compensation Without Award;

(c) Form No. 6 - Attending Physician's Report;

(d) Form BEC-208 - Compensation Stopped or Suspended.

Forms under (b) and (d) were filed in the instant case. Proof that those under (a) and (c) were filed is not in this record because of the posture of this litigation in the District Court which involved a dismissal of the

cause of action by the District Court on jurisdictional grounds without reaching the issue on the merits.

This Court has given recent consideration to the assignment provisions of 33 U.S.C. § 933(b). In *Rodriguez v. Compass Shipping Co., Ltd.*, 451 U.S. 596, 101 S. Ct. 1945, 68 L. Ed. 2d 472 (1981), the question presented was whether the longshoreman could prosecute his personal injury action against the shipowner after his right to recover damages had been assigned to his employer by operation of the above-mentioned statute. This Court held that where the three longshoremen filed their actions against third parties well beyond the six-month period following acceptance of compensation and offered no excuse for their delay, they could not prosecute the actions after the right to recover damages had been assigned to their employers by the terms of the Longshoremen's and Harbor Workers' Compensation Act, and that it was not material that the employers failed to pursue the assigned claims.

Each of the petitioners in the above case was a longshoreman who was injured aboard ship in the regular course of his employment. In the *Rodriguez* and *Barulec* cases the petitioners and their employers agreed to settlements in informal conferences convened by the Office of Workers' Compensation Programs. The other petitioner did not contend in the District Court that he had not accepted "compensation under an award," within the meaning of § 933(b). The District Court concluded that the settlement agreements reached after official informal conferences were equivalent to formal orders for the purposes of § 33(b) and this ruling was affirmed on appeal. See 617 F.2d at 958-960. No formal orders were entered. Although petitioners challenged this ruling in their petition for certiorari, the order granting the petition did not

extend to this question. This Court, for the purpose of its decision, assumed that the acceptance of compensation operated as an assignment under § 33(b).

This Court, speaking through Mr. Justice Stevens, had this to say concerning the assignment provisions of § 33(b), at page 1950:

> "The language of § 33(b) is both mandatory and unequivocal. It provides that the acceptance of compensation under an award '*shall operate* as an assignment to the employer of *all right* of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.' 33 U.S.C. § 933(b). (Emphasis supplied by Court)
>
> "The only conditions precedent to the statutory assignment are the acceptance of compensation pursuant to an award in a compensation order and the passage of the required period of 6 months. These conditions are admittedly satisfied in these cases. The statutory assignment encompasses 'all right' of the employee to recover damages from a third party. * * *"

In referring to SENATE REPORT No. 428, *supra*, and HOUSE REPORT No. 229, *supra*, this Court clearly adopted the proposition that the limitation period is six months. In *Rodriguez v. Compass Shipping Co., Ltd., supra*, it said at page 1954:

> "Nothing in the 1959 Amendments purports to preserve the employee's right to commence a third-party suit after the 6-month period expires. Although the Amendments encourage employers to pursue assigned claims, *they do not qualify the assignee's con-*

trol of the cause of action after the assignment takes place. To the contrary, the legislative history indicates that once the 6-month period expires, the employer possesses complete control of third-party claims." (Emphasis supplied.)

It is clear from the ruling in this case that the entry of a formal award in a compensation order is not required to support an assignment under § 933(b). The primary question that remains is whether, assuming the absence of a formal award, the acceptance of compensation by the petitioner and the filing of documents by the employer with the deputy commissioner satisfies the requirements of the statute.

In the case of *Simmons v. Sea-Land Services*, 676 F.2d 106 (4th Cir. 1982), *cert. den.* 103 S. Ct. 242, the longshoremen brought actions against the allegedly negligent shipowners. The District Court granted summary judgment to the defendants. The longshoremen appealed and the Court of Appeals held that the longshoreman who accepts compensation under an award in a compensation order has six months to bring an action against a third party and that failure to do so operates as an assignment of his claim to his employer or its subrogee; that where the employer, not having disputed its liability, voluntarily pays compensation to the longshoreman which is accepted and notice thereof is filed with the deputy commissioner, the six-month limitation period in the statute is started without regard to subsequent suspensions of payments or formal awards of benefits. In addressing itself to the question of what constitutes "an award in a compensation order," the Court said (p. 109):

"Having determined that Section 933(b) contemplates an informal award, we next turn to the req-

uisites of such an award. As revealed by the facts of these cases, a number of events may occur during the disability period which could be interpreted as the culmination of an informal award. *However, as we stated in Ameta, the essence of an award is 'an act of ratification of compensation, whether formal or informal, and the subsequent acceptance by the claimant.'* 564 F.2d at 1102. In addition, the award must serve the dual purpose of protecting the welfare and rights of the longshoreman while not unduly delaying the employer's access to relief from the negligent third party.

"With these concepts in mind, we hold that 'an award in a compensation order' is created by the completion of three events: (1) *the employer, having not contravened its liability, initiates compensation payments to the longshoreman;* (2) *the deputy commissioner files the employer's notice that compensation payments have been initiated;* and (3) *the longshoreman accepts any of the payments.* Such an award triggers the six-month period without regard to subsequent suspensions in payment or formal awards of benefits. We believe that this rule will foster the prompt payment of benefits by eliminating the need for perfunctory contravention by the employer, and will provide the employer with access to its remedies within a reasonable time. As in all such cases, the six-month period will protect the longshoreman by giving him an opportunity to investigate and weigh his options." (Emphasis supplied.)

In the above case the longshoremen, because of the failure of their employers to pursue their third-party claims, contended that the claims were reassigned to them by their employers. The Court of Appeals affirmed the

ruling of the District Court that the purported reassignments were invalid as the Longshoremen's and Harbor Workers' Compensation Act did not sanction reassignments (p. 110).

The three "events" set forth above were all completed in the case at bar. The employer voluntarily initiated payment of compensation benefits which were accepted by the respondent, and the employer, by the filing of LS-206, gave notice that the payments had been initiated. Clearly, the "award in a compensation order" existed and the assignment provisions of the statute were operative.

In *Ambrosino v. Transoceanic S. S. Co., Ltd.*, 675 F.2d 470 (2d Cir. 1982), two longshoremen appealed from a judgment of the District Court dismissing their suits against the vessel owner for injuries sustained in the course of their employment. Both received compensation benefits as a result of the filing of Memoranda of Informal Conferences. The Court of Appeals ruled that where the longshoremen failed to bring suit within six months after acceptance of compensation there resulted an assignment of their causes of actions to their employers who thereafter had the exclusive right to pursue the third-party claims against the shipowner and that a different result was not mandated by amendments to regulations made in connection with the Longshoremen's and Harbor Workers' Compensation Act. The Court, in ruling on the assignment issue, stated (p. 471):

> "The undisputed facts are that each plaintiff accepted from his employer, the stevedore, compensation for his permanent disability following an informal conference convened by a United States Department of Labor claims examiner in the Office of Workers' Compensation Programs (OWCP). In each case, the

Department issued a Memorandum of Informal Conference, but no formal compensation order was entered and no party requested such an order. *Both plaintiffs brought suit in district court more than six months after they accepted payment from their employer.* In the *Ambrosino* case, the complaint was dismissed after defendant's answer and oral motion to dismiss; in the *Cigliano* case, defendant's motion for summary judgment was granted. In both cases, the district court relied on our decision in *Rodriguez*, supra, and disposed of the claim on the same ground: *The longshoreman's failure to bring suit within six months after acceptance of a compensation award resulted in an assignment of his cause of action to his employer, who thereafter had the exclusive right to pursue the third-party claim against the shipowner, 33 U.S.C. § 933(b).*" (Emphasis supplied.)

The Court rejected the appellants' contention that, based upon the provisions of 20 C.F.R. § 705.312, no compensation order had been issued because the claims examiners had not been designated by the Director to perform that duty (675 F.2d at pages 471 and 472).

The Court below specifically declined to follow *Liberty Mutual Ins. Company v. Ameta & Co., supra,* and *Larson v. Associated Container Transp. (Australia),* 459 F. Supp. 561 (E.D. Va. 1978) (Joint App. 41). The *Liberty Mutual* case having been previously discussed, we now proceed to a consideration of the *Larson* decision.

The *Larson* case involved an action brought by a longshoreman against the shipowner claiming that his injuries were caused by a condition on the vessel brought about by negligence of the crew. On defendant's motion for a summary judgment, the Court held that payments of benefits under the Longshoremen's and Harbor Workers'

Compensation Act, with the requisite filing of documents and reports with the United States Department of Labor, and the acceptance of those payments by the longshoreman, started the running of the six-month period under the statute and the longshoreman's suit, initiated beyond that period was untimely. In addressing the questions of whether an "award" was made and whether an assignment of plaintiff's claim had taken place, the Court stated (p. 562):

> "The crux of the issue in this case turns on a determination of if, and when, an 'award' was made. Plaintiff relies on *Liberty Mutual Insurance Company v. Ameta & Company*, 564 F.2d 1097 (4th Cir. 1977), *wherein the court held that an 'award' need not be a formal award to bring about a statutory assignment of rights under section 33(b).* Rather the crucial factor in determining whether an award has been made is whether there has been 'some act of ratification of compensation, whether formal or informal, and the subsequent acceptance of compensation by the claimant.' *Id.* at 1102." (Emphasis supplied.)

At page 563 the Court continued:

> "Under the holding of *Liberty Mutual* and the facts of this case, there are at least three possible events that could be deemed to constitute an informal award so as to commence the running of the six-month period: the initial payment of compensation and acceptance by the injured longshoreman; the termination of the payment of compensation by the employer; and some event intervening between these other two occurrences."

Finally, after discussing the philosophy behind the statute with particular reference to the 1959 amendment, the Court ruled as follows (p. 564):

"Thus the Court concludes that the payment of benefits under the LHWCA with the requisite filing of documents and reports with U.S. Department of Labor and the acceptance of those payments by the plaintiff *started the six-month period of section 33(b) to run.* That these filings, payments and acceptance of compensation should be deemed to constitute an informal award so as to begin the six-month period is buttressed further by the provisions of sections 14(h), (i). 33 U.S.C. §§ 914(h), (i). *Under those sections, the deputy commissioner at any time in a case in which payments are being made without a formal award may take such action necessary, including requiring an employer to deposit monies with the United States, to secure payment of compensation to the injured person.*" (Emphasis supplied.)

The refusal of the Court below to follow *Liberty Mutual* and *Larson* arose out of its strict and narrow construction of the "award" provision of 33 U.S.C. § 933 (b). Its ruling in that connection is manifestly erroneous.

The tendency of recent decisions to "consider the realities of the situation" rather than requiring a strict construction of the statute is illustrated in the case of *Francavilla v. Bank Line, Ltd.*, 470 F. Supp. 94 (D.C.S.D. N.Y. 1979). There the longshoreman, injured on the defendant's vessel, filed a claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act. He received compensation from his employer, which included payment for temporary disability as well as a lump sum payment for permanent disability. At an informal conference held before a claims examiner the amount agreed upon to be paid to the plaintiff was arrived at and the total paid was set forth in a memorandum filed by the claims examiner. A little more than two

years later the suit against the vessel owner was filed. In ruling on the issue of what constitutes an "award," the Court said (p. 96):

> "• • • Indeed, it appears that concern for the harsh consequences of such an automatic assignment may have motivated the Courts of the *Grasso* era to strictly construe the meaning of an award in a compensation order. *See, e.g., Sessa v. Weeks Stevedoring Co.*, 56 F.Supp. 50, 51 (S.D.N.Y. 1943). Today, of course, a claimant who accepts benefits pursuant to an award has six months within which to commence its action against the third party. 33 U.S.C. § 933(b). *Thus, the rationale for the Grasso line of cases may have lost some of the force of years past. In fact, it appears that the most recently decided cases in the area have opted for a liberal reading of what constitutes an award. See Liberty Mutual Insurance Company v. Ameta and Co.*, 564 F.2d 1097 (4th Cir. 1977); *Rodriguez v. Compass Shipping Ltd.*, 456 F.Supp. 1014 (S.D.N.Y. 1978). • • •" (Emphasis supplied.)

The Court, at page 97, said this in connection with the "realities of the situation":

> "In determining whether compensation has been received under an award, a Court must concern itself with 'the realities of the situation,' rather than with 'the labels employed.' *Sabol v. Merritt Chapman & Scott Corporation*, 241 F.2d 765 (2d Cir. 1957). In this case a memorandum was filed reflecting the agreement of the parties, payments were made and the case was closed by the filing of the appropriate form with the Bureau of Employees Compensation, U.S. Department of Labor. All these affirmative acts, in my view, are sufficient to constitute an award within the meaning of section 933(b)."

Other decisions which discuss the assignment issue are:

Collins v. Norfolk Shipbuilding & Drydock Co., 522 F. Supp. 1211 (U.S.D.C. E.D. Va. 1981);

Panzella v. Skou, 471 F. Supp. 303 (D.C.S.D. N.Y. 1979);

Oman v. Johns-Manville Corp., 482 F. Supp. 1060 (D.C.E.D. Va. 1980);

Barriero v. Meriuienti O/Y, 495 F. Supp. 193 (D.C. S.D. N.Y. 1980).

One of the "realities" in the instant case is the fact that during the time that the stevedore-employer was paying compensation and the petitioner was accepting it he was represented by competent counsel. Payment of compensation benefits was terminated on April 26, 1977, by the filing of Form LS-208 and Duris was represented by counsel on April 12, 1977 (Joint App. 4). It must be assumed that from that time on he was fully advised as to his third-party rights. The record here is barren of any reason why the assignment provisions of 33 U.S.C. § 933(b) should not be enforced.

(b) There Is No Conflict of Interest in the Instant Case Between the Respondent and His Employer Which, Under the Doctrine of the Czaplicki Case, Would Validate the Filing of the Third-Party Action Beyond the Six-Month Period.

It is apparent that the Court below, in ruling that the respondent's suit was not statutorily assigned, was greatly influenced by the doctrine of conflict of interest. The Court, in declining to accept the argument that the Act

provided an incentive to the employer by permitting it to keep twenty percent of any recovery over the costs of litigation and all compensation due, said (Joint App. 45):

> "This analysis loses its appeal, however, if we *consider the very real threat of conflicting interests between employer and employee.*
>
> "As noted earlier, the most likely third party tortfeasor will be the vessel owner or charterer, the owner or lessee of the longshoreman's workplace. *On the other hand, the employer-assignee* is by definition a stevedoring contractor whose clients are those very same shipowners or charterers. *The juxtaposing of this stevedore-client relationship between the employee and the tort-feasor presents obvious disincentives to the bringing of the employee's action by the employer.* If the employer-assignee depends to any significant degree upon the shipowner or charterer for future business, the probability that it will enforce the rights of its injured employee against the third party-client is reduced. Nor will the likely imposition of the employer's carrier-subrogee between it and the third party-client alleviate the conflict. The insurance company can hardly ignore the business relationships of its own clients. *This conflict of interest problem makes us hesitate to countenance any interpretation of the Act which would expand the assignment provisions of section 33.* If in fact the employer is unlikely to vindicate the rights of the employee, an assignment becomes increasingly similar to the harsher legal doctrine of election of remedies. Such a substantive reinterpretation of the statute lies far beyond the power of this court." (Emphasis supplied.)

This Court in *Czaplicki v. The Hoegh Silvercloud, et al.*, 351 U.S. 525 (1956), validated a late suit by the

longshoreman against the vessel, her owners, her operators and the contractor who built the steps which collapsed, causing the involved injuries. Payments of compensation made under an award by a Deputy Commissioner were made by an insurer who had insured both the employer and the contractor. This Court ruled that under 33(b), petitioner's acceptance of the award had the effect of assigning his rights of action against third parties to his employer, to whom the insurer was subrogated; but that the longshoreman was not precluded from bringing his action in the circumstances of this case because his rights were held by the insurer—the party most likely to suffer from the enforcement of those rights.

Not only this Court, but numerous lower federal courts, have interpreted the ruling in *Czaplicki* as being confined to the circumstances of that case.

In *Rodriguez v. Compass Shipping Co., Ltd., supra,* this Court stated at pages 1951 and 1952:

> "In 1956, this Court held that an injured longshoreman could enforce his right of action against a third party, notwithstanding his acceptance of compensation from his employer. *Czaplicki v. The Hoegh Silvercloud,* 351 U.S. 525, 76 S.Ct. 946, 100 L.Ed. 1387. In that case, both the employer and the third party allegedly responsible for the unseaworthy condition that had caused the employee's injury were insured by the Travelers Insurance Company. *Because the stevedore had no interest in recovering the compensation payments that had been made by its insurance carrier, and because that carrier would be responsible for both prosecuting and defending any third-party claim, no one other than the injured longshoreman had a sufficient interest in the claim to bring suit.*

Because of the conflict between the assignee's interest and the interest of the employee, the Court construed the Act to allow the longshoreman to enforce the third-party claim in his own name. *The Court did not hold that no assignment had occurred; rather, it held that under 'the peculiar facts' of the case, the election and consequent assignment did not bar the employee's action.*" (Emphasis supplied.)

This Court considered the effect of the 1959 amendment on the conflict of interests issue and, at pages 1954 and 1955, stated:

"This history forecloses the argument that Congress did not intend an assignment of a third-party claim to be effective unless there was an absence of any potential conflict of interest between the assignee and the longshoreman. The statutory language provides a different and clearly defined solution to the conflict of interest problem that had been created by *Ryan Stevedoring. Congress unequivocally made the choice in favor of first giving the employee exclusive control of the cause of action for a 6-month period and then giving the employer exclusive control thereafter, instead of opting for any form of simultaneous joint or partial control. The simple standard set forth in § 33(b) protects the interests of both employees and employers, and is consistent with the general policy of the Act to encourage the prompt and efficient administration of compensation claims.* See *Potomac Electric Power Co. v. DWCP*, ... U.S. ....., ..., 101 S. Ct. 509, 516, 66 L.Ed.2d 446." (Emphasis supplied.)

In *Hernandez v. Costa Armatori S.p.A, Pia Costa*, 467 F. Supp. 1064 (E.D. N.Y. 1959), *aff'd* 622 F.2d 573

(2d Cir. 1980), the question of conflict of interest was exhaustively considered. It involved a suit by a longshoreman to recover for injuries sustained while employed by a stevedore on defendant's vessel. The defendant moved for summary judgment, asserting that plaintiff's claim had been assigned to the stevedore by operation of law since the plaintiff did not bring the action within six months after the acceptance of payments under an award in a compensation order. The Court held that "(1) the deputy commissioner may delegate the power to make an effective award satisfying the provisions of the statute and (2) *while plaintiff alleged that a 'conflict of interest' existed between himself and the stevedore such that he should be permitted to prosecute his action against the shipowner, plaintiff referred only to conflicts of interest of which Congress was aware in enacting the statute, to wit, a claim that the stevedore was reluctant to bring an action against the vessel owner for fear of damaging customer relationships, and a claim that the employer, as assignee, had a motive to urge, in an action against a third party, a disability no greater than that found in the compensation proceedings.*" 467 F. Supp. at page 1064 (Emphasis supplied.)

The District Court, in addressing itself to both issues, said at page 1065:

> "Plaintiff contends that he has not lost his right to sue because (1) the settlement agreement was not an 'award in a compensation order filed by the deputy commissioner or Board' and there was no assignment and (2) that, even assuming an assignment, there is such a conflict between plaintiff's interests and those of the assignee-employer that he should be allowed to prosecute the action."

The Court continued on page 1066:

> "The purpose of the 1938 amendment requiring 'an award in a compensation order' before acceptance would be deemed an assignment was evidently to cause the employee to focus on the consequences of acceptance. Presumably he would thus be aware of his loss of the right to bring suit against a third party. *See H.R.Report No. 1945, 75th Cong., 3rd Sess. (1938). The courts held that to accomplish this end it was sufficient that there be 'some official action' by the deputy commissioner and that entry of a formal order was not required. Grasso v. Lorentzen*, 149 F.2d 127, 128-129 (2d Cir.), *cert. denied*, 326 U.S., 743, 66 S.Ct. 57, 90 L.Ed. 444 (1945). *See also Toomey v. Waterman S.S. Corp.*, 123 F.2d 718, 721 (2d Cir. 1941)." (Emphasis supplied.)

In concentrating on the "conflict of interest" question, and with particular reference to the decision of *Czaplicki, supra*, the Court, at page 1066, stated:

> "Czaplicki sued, among others, a contractor who had constructed the steps that caused his injury. *The compensation carrier subrogated to the employer's rights (see Section 933(h)) also insured the contractor. There was thus no motive for the insurer as assignee to pursue the claim against the contractor. The assignee obviously had no interest in suing in effect itself.*" (Emphasis supplied.)

> "In order to enable Czaplicki to protect his interest in the claim the Supreme Court read a 'conflict of interest' exception into the absolute statutory language providing that acceptance 'shall operate' as an assignment. As the Supreme Court said, 'Czaplicki's rights of action were held by the party most likely

to suffer were the rights of action to be successfully enforced.' *Id.* at 530, 76 S.Ct. at 949. *The Court held that the Act 'presupposes that the assignee's interests will not be in conflict with those of the employee' and permitted the plaintiff 'to enforce, in his own name, the rights of action that were his originally.' Id.* at 531, 76 S.Ct. at 950." (Emphasis supplied.)

The Court in the *Hernandez* case ruled that the *Czaplicki* exception had not been abolished but, at page 1067, went on to say:

"However, it does not follow that the Act should be construed to allow every potential conflict of interest between the employee and the assignee to vitiate the assignment. *Here plaintiff claims that the stevedore was naturally reluctant to bring action against the vessel owner for 'fear of damaging customer relationships.' But this is not the kind of matter that Congress could have viewed as sufficient to invalidate the assignment. Such a conflict has always been inherent in the statutory scheme. Presumably every stevedore would prefer not to give offense to its customer.*" (Emphasis supplied.)

This Court in *Rodriguez, supra*, declined to accept the rule that *Czaplicki* applies whenever a potential conflict of interest is present and, at 101 S. Ct. 1956, n.34, cites the *Hernandez* case, *supra*, with approval. It said:

"Petitioners suggest that such an automatic rule is justified because of a stevedore's normal reluctance to file suit against a customer. However, in rejecting a similar conflict of interest argument, the District Court in *Hernandez v. Costa Armatori, S.p.A.*, 467 F. Supp. 1064 (EDNY 1979), aff'd 622 F.2d 573 (CA2 1980), identified the flaw in this reasoning:

> '[T]his is not the kind of matter that Congress could have viewed as sufficient to invalidate the assignment. Such a conflict has always been inherent in the statutory scheme. Presumably every stevedore would prefer not to give offense to its customer.' "

The Court below, in the instant case, in considering the "conflict of interest" issue, has "painted with a broad brush." In applying it to the classical relationship between longshoreman and stevedore, which is the situation here, it has totally disregarded the narrowness of the *Czaplicki* exception.

The completeness of the assignment to the employer under 33(b) and the effect of the *Czaplick.* exception upon an attempted reassignment of the claim to the longshoreman was decided by the District Court in *Bandy v. Bank Line, Ltd.*, 518 F. Supp. 1229 (D.C.E.D. Va. 1981), upon remand from the Court of Appeals. In that case an action was brought by an injured longshoreman to recover for injuries sustained on the defendant's vessel. The United States District Court for the Eastern District of Virginia, at Norfolk, 442 F. Supp. 882, entered summary judgment in favor of the vessel owner and an appeal was taken. The Court of Appeals, 618 F.2d 1037, vacated and remanded. On remand the District Court ruled that once the cause of action was assigned to the employer under section 33(b) it did not revest in the longshoreman simply because the employer failed to pursue the claim.

The Court overruled the defendant's second Motion for Summary Judgment to permit the longshoreman to present evidence concerning any conflict of interest. When the plaintiff offered no further evidence on that issue, the Court stated (p. 1230):

"On April 7, 1978, the defendant filed a second Motion for Summary Judgment, contending that the plaintiff had not sought any discovery or presented any issues of fact with respect to the conflict of interest. The plaintiff thereafter advised this Court that he had no further evidence to present on this issue. Accordingly, following a review of the file, we found no evidence of a conflict of interest and granted the defendant's Motion for Summary Judgment *because, under the statute, the plaintiff's delay in filing suit of more than six months after the termination of the compensation benefits resulted in an exclusive assignment of his right of action to his employer.*" (Emphasis supplied.)

On page 1231 the Court continued:

"The issue in *Rodriguez* was 'what, if any, right the longshoreman has against the third-party shipowner if he does not sue within the six-month period and the employer fails to do so thereafter,' ..... U.S. at ....., 101 S.Ct. at 1949, precisely the issue addressed by the Fourth Circuit in *Caldwell*. After an exhaustive examination of the legislative history of the Act, preceded by the *caveat* that '"absent a clearly expressed legislative intention to the contrary, the [statutory] language must ordinarily be regarded as conclusive."' ..... S.Ct. at 1951 (citation omitted), the Court essentially found that the longshoreman's right to file suit was completely cut off unless he could prove a conflict of interest as delineated by *Czaplicki*."

The final conclusions of the Court, as set forth at page 1233, are as follows:

"In sum, we FIND that the exclusive right to the instant cause of action was assigned to the plain-

tiff's employer under section 33(b) of the Act. *Moreover, under Rodriguez, a reassignment of the action can occur only if evidence of a conflict of interest, as delineated in Czaplicki, is present; the simple failure of the employer to prosecute the claim is not enough. The record contains no evidence of a Czaplicki type of conflict.* Moreover, the assignment executed by American and delivered to the plaintiff is ineffective. Accordingly, the defendant's Motion for Summary Judgment is GRANTED and the plaintiff's Complaint is DISMISSED." (Emphasis supplied.)

In the case of *Perez v. Arya National Shipping Line, Ltd.*, 468 F. Supp. 799 (D.C.S.D. N.Y. 1979), an injured longshoreman who had accepted compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act brought an action for damages against the shipowner. The Court ruled that the longshoreman, and not the shipowner, bore the burden of proof on the issue of whether there was such a conflict between the interests of the longshoreman and the interests of his employer as would permit the longshoreman to bring an action against the shipowner more than six months after accepting an award of compensation benefits. The accident occurred in August 1973. In March 1975 the Workmen's Compensation Board entered the compensation order and the suit was filed fifteen months later.

The Court, in giving consideration to the question of whether the cause of action was statutorily assigned and the effect of the *Czaplicki* exception, said (page 800):

"As amended in 1959, section 33(b) of the LHWCA provides:

'Acceptance of such compensation under an award in a compensation order filed by the deputy com-

> missioner or Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.'

33 U.S.C. § 933(b). The shipowner moves to dismiss the complaint on the grounds that since Perez did not commence this action within six months of the Board's award, his cause of action was assigned to his employer, and he cannot maintain this suit. In response Perez cites *Czaplicki v. The Hoegh Silvercloud*, 351 U.S. 525, 76 S.Ct. 946, 100 L.Ed. 1387 (1956), which carved an exception to the mandate of section 33(b). The principal question presented here is not whether the exception remains viable, but who bears the burden of proving whether it applies or not in a given case.

• • • • •

"Until the amendment of the LHWCA in 1959, the employee lost his right to sue immediately upon accepting compensation under an award, rather than six months later. See Pub.L.No. 86-171, 73 Stat. 391 (1959). This was the situation when the Supreme Court rendered its decision in Czaplicki. Noting that '[i]n giving the assignee exclusive control over the right of action . . . the statute presupposes that the assignee's interests will not be in conflict with those of the employee, and that through action of the assignee the employee will obtain his share of the proceeds of the right of action, if there is a recovery,' the Court construed section 33(b) as allowing an employee to sue in his own name 'where there is

such a conflict of interests [and] the inaction of the assignee operates to defeat the employee's interest in any possible recovery.' *Czaplicki v. The Hoegh Silvercloud*, 351 U.S. 525, 531, 76 S.Ct. 946, 950, 100 L.Ed. 1387 (1956)." (Emphasis supplied.)

In further discussing the application of the conflict of interest doctrine, the Court, at page 801, said:

"* * * The solicitude towards employees reflected in the liberal application of the conflict of interest exception in cases such as *Potomac Electric Power Co. v. Wynn* can be attributed largely to the unavoidable conflict of interest created by that doctrine. *In view of the 1972 amendments, such solicitude is no longer warranted. Finally, the 1972 amendments substantially increased the compensation payable to an injured longshoreman. Id.* § 5(a) (*codified at 33 U.S.C.* § *906*). *The compensation now available to a longshoreman is more nearly commensurate with his actual damages, and consequently it is appropriate to require the longshoreman to demonstrate his right to sue after he has already received compensation.*" (Emphasis supplied.)

The Court, in rejecting the contention by Perez that the assignment of his claim to his employer contravenes the purposes of the Act because it deprives him of his claim against third parties and indirectly indemnifies the third party, said (p. 802):

"Whatever first-blush appeal these arguments may have, on reflection they are unpersuasive. First, whatever the consequences of a failure to sue, an employee who fails to sue within six months of accepting compensation under an award of the Workmen's Compen-

sation Board is as responsible for that failure as an employer who neglects, for whatever reason, to pursue an assigned claim. Second, an employer's failure to recover from a third party for the third party's negligence is not the same thing as an employer's indemnifying a third party on the basis of the employer's own negligence or breach of warranty. *The 1972 amendments were intended to ensure that employers would not be liable, not that third parties would be. Finally, there is no reason to assume that an employer's failure to sue necessarily reflects a breach of an obligation, if any exists, to husband its resources. On the contrary, such a failure may mean merely that the chances of winning the case are too remote to warrant suit.*" (Emphasis supplied.)

The defendant's motion to dismiss was denied without prejudice to renewal after forty-five days.

When the *Rodriguez* case was before the United States Court of Appeals, consideration to the conflict of interest issue was given. *Rodriguez v. Compass Shipping Co., Ltd.*, 617 F.2d 955 (2d Cir., 1980). In considering the effect of *Czaplicki*, the Court said (p. 960):

"*Czaplicki* is clearly distinguishable and, as we pointed out in *Sabol v. Merritt Chapman & Scott Corp.*, 241 F.2d 765, 768 (2d Cir. 1957), 'was carefully limited by the court to the peculiar situation there presented.' It was decided prior to the 1959 amendments of § 33(b). At that time the employee, upon entering into a settlement agreement with his employer and accepting compensation, immediately lost any right to sue the shipowner, since that right, by assignment, became exclusively the right of the employer. However, in *Czaplicki* the employer's insurer,

which by subrogation acquired the employer's exclusive assigned right to sue, was also the shipowner's insurer. Thus, if the insurer brought suit it would as a practical matter not only be suing itself but also be under an obligation to turn over 80% of any recovery in excess of compensation payments and attorney's fees to the employee. In the absence of any right at all on the part of the employee to sue the shipowner, the Supreme Court understandably held that the conflict of interest was sufficient to nullify the assignment, noting that 'Czaplicki's rights of action were held by the party most likely to suffer were the rights of action to be successfully enforced,' 351 U.S. at 530, 76 S.Ct. at 949. . . ."

This Court in *Rodriguez, supra,* concluded that the *Czaplicki* conflict of interest has been substantially undercut, if not overruled by the intent behind the 1972 amendments. In stating that the changes made in the 1972 amendments "balanced the conflicting interests of the vessel owner, the stevedore and the longshoreman," this Court stated at page 1957:

"Three of the 1972 Amendments are pertinent. First, the level of benefits was substantially increased, thereby increasing the likelihood that the statutory compensation recoverable without proof of fault would be adequate. Second, the shipowner's right to seek indemnity from the stevedore under *Ryan Stevedoring* was eliminated, thereby removing a category of litigation from the courts, placing more definite limits on the stevedore's insurance costs, and removing a potential source of conflict between the interests of employers and employees. Third, the shipowner's nearly absolute liability for unseaworthiness was eliminated,

thereby further narrowing the area of potential litigation and increasing the relative importance of statutory awards as the favored method of compensation. See generally *Scindia Steam Navigation Co. v. De Los Santos*, ... U.S. ....., ..., 101 S.Ct. 1614, 1620-1621, 67 L.Ed.2d ..... *In making these changes, Congress necessarily balanced the conflicting interests of the vessel owner, the stevedore, and the longshoreman. As with other problems of interpreting the intent of Congress in fashioning various details of this legislative compromise, the wisest course is to adhere closely to what Congress has written. The meaning of § 33(b) is plain and should be respected.*" (Emphasis supplied.)

The Court below, in strictly construing the provisions of Section 33(b) and ruling that they did not cover the situation in the instant case, did so largely because, in its view, the conflict of interests between the longshoreman and the stevedore would reduce the probability that the latter would protect the rights of the former. (Joint App. 45). That this apprehension is not justified is set forth in the *Rodriguez*, *Hernandez*, *Perez* and *Bandy* decisions, *supra*, which we have discussed at some length (Br., pp. 23-35). The conflict of interest, here, is not only the type which Congress had in mind in enacting the 1959 amendments, but those amendments, together with those enacted in 1972, balanced the interests of the three parties involved. In the case at bar the Court below was dealing with the classic relationship between the longshoreman and his employer without the complexity of the *Czaplicki* situation. It should have interpreted the provisions of Section 33(b) in the light of that classic situation and, in the absence of unusual conflicts of interests, found the existence of the statutory assignment of the respondent's cause of action.

CONCLUSION

The voluntary payment of compensation benefits by his employer to the respondent, plus the acceptance and filing of the required forms by the Bureau of Employees Compensation, Department of Labor, constituted, contrary to the ruling of the Court below, an "award in a compensation order, within the provisions of 33 USC § 933(b)." The conflict of interest between the respondent and his employer was the normal relationship between those parties, which did not operate to invalidate the assignment provision of that statute. The decision below should be reversed and the amended complaint against the petitioner should be dismissed.

Respectfully submitted,

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No. 82-502

In the Supreme Court of the United States

October Term, 1982

PALLAS SHIPPING AGENCY, LTD.,
Petitioner,

vs.

JOSEPH DURIS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether the mere receipt of compensation benefits paid without award constitutes an award in a compensation order filed by the Deputy Commissioner or Benefits Review Board, as proscribed by 33 U.S.C. 933(b)?

2. Whether the *Czaplicki* conflict of interest exception to 33 U.S.C. 933(b) applies to the present matter?

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No. 82-502

In the Supreme Court of the United States

October Term, 1982

PALLAS SHIPPING AGENCY, LTD.,
Petitioner,

vs.

JOSEPH DURIS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT

SUMMARY OF ARGUMENT

The Sixth Circuit Court of Appeals decision that the mere acceptance of compensation benefits does not trigger the assignment provision of 33 U.S.C. 933(b) is consistent with the express language of the Longshoremen and Harbor Workers Compensation Act which demands that an award in a compensation order filed by the Deputy Commissioner or Board be issued prior to the commencement of the assignment provision of section 33(b). Further, this decision effectuates the congressional purpose of creating a comprehensive scheme whereby longshoremen are compensated while unable to pursue claims against third parties without denying them the right to later pursue such claims, pursuant to an informed decision.

Regarding the conflict of interest issue, the court below merely held that the possibility of such an argument made it hesitant to broaden the interpretation of section 33(b).

The Circuit Court's decision in this matter reflects the congressional purpose and is confined to the express language of the statute and should, therefore, be affirmed.

ARGUMENT

I. THE DECISION OF THE COURT BELOW THAT RESPONDENT IS NOT TIME BARRED FROM INSTITUTING SUIT SHOULD BE AFFIRMED.

(a) Section 33(b) Specifically Requires That an Award in a Compensation Order Must be Filed by the Deputy Commissioner or Board Before an Assignment of the Longshoreman's Claim Against a Third Person Occurs. This Section Should be Strictly Construed so as to Satisfy the Terms of the Provision and the Congressional Purpose.

The key issue before this Court can be simply noted as follows: what activity triggers the assignment provision of 33 U.S.C. 933(b)?[1] The statute calls for "acceptance of compensation under an award in a compensation order filed by the Deputy Commissioner or [Benefits Review] Board."[2] 33 U.S.C. 933(b) 1972.

It is respectfully submitted that the holding of the court below that ". . . the mere receipt of compensation benefits under the Act does not trigger the assignment provision of section 33(b)," *Duris v. Erato Shipping, Inc.*, 684 F.2d 352 (6th Cir. 1982) is the correct and proper holding under the facts of the case at bar and is entirely

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1. 33 U.S.C. 933(b) (1972) provides: Acceptance of such compensation under an award in a compensation order filed by the Deputy Commissioner or Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

2. 33 U.S.C. 902(20) provides: "The term 'Board' shall mean the Benefits Review Board."

consistent with the congressional purpose in enacting the aforementioned section; which section includes narrowly precise language relative to acceptance of an award.

The Petitioner herein relies upon several cases, predominantly out of the Fourth Circuit, which have evolved in recent years to hold that the *mere* acceptance of compensation benefits operate to commence the running of the six month statute of limitations. The Respondent submits that these cases are aberrations and in direct conflict with the clear and unequivocal wording of the Act, Congressional purpose, numerous decisions at the district court level, and the Sixth Circuit and Second Circuit Courts of Appeals.

In examining this statute it was clear to the court below that the six month time period does not begin to run until the longshoreman has accepted compensation under an award in a compensation order filed by the Deputy Commissioner. While the language of this provision seems clear and straightforward it nevertheless becomes necessary for this Court to construe this language to determine when the six month statutory bar begins to run.

Determination of the construction of this language has become necessary due to the aforementioned confusing line of decisions out of the District Courts and Court of Appeals for the Fourth Circuit. Decisions from the Fourth Circuit beginning with *Liberty Mutual Insurance Co. v. Ameta & Co.*, 564 F.2d 1097 (4th Cir. 1977) have gradually eroded the language of section 33(b). This process began in *Ameta* with the Court's holding that although there had been no formal award of compensation, "documents . . . received, filed and accepted by the deputy commissioner constituted sufficient action and determination by

the Deputy Commissioner granting benefits to the injured longshoreman to constitute an 'award.'" *Larson v. Assoc. Container Transp. (Australia)*, 459 F. Supp. 561, 562-3 (E.D. Va. 1978); *accord, Collins v. Norfolk Shipbuilding & Drydock Co.*, 522 F. Supp. 1211 (E.D. Va. 1981).

Most recently, the Fourth Circuit has utilized the concept of the "informal award" articulated in *Ameta* and *Larson*, to justify their holding in *Simmons v. Sea-Land Services, Inc.*, 676 F.2d 106, 109 (4th Cir. 1982) that the mere acceptance of compensation benefits by the injured worker constitutes "acceptance of compensation under an award in a compensation order filed by the Deputy Commissioner or Board."

To further complicate the issue, a variety of arguments and rules have been made to avoid the effects of section 33(b) of the Longshoremen and Harbor Workers Compensation Act ("Act"). Requirements for full appraisal have been imposed.[3] Mandates that the longshoreman must first receive a fixed compensation amount have issued.[4] Courts have held that the order can be formal

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3. *Rodriguez v. Compass Shipping Co., Ltd.*, 617 F.2d 955, 959 (2d Cir. 1980) (The Deputy Commissioner need not file a formal compensation order for the assignment provision to commence provided the employee knew he was foregoing his right to sue by acceptance of a compensation argument); *D'Amico v. Cia De Nav. Mar. Netumar*, 677 F.2d 249 (2d Cir. 1982) (An award in a compensation order does not issue where a longshoreman was not represented by counsel, was not favored with a conference before a claims examiner and received no notice of the six month limitation period in that it is not at all clear that he knew or can be charged with knowing the legal implications of accepting a final compensation award.)

4. *Verderame v. Torm Lines*, 670 F.2d 5, 7 (2d Cir. 1982) ("We hold that until the amount of compensation benefits to be received by the injured longshoreman is fixed, either by order, stipulation of the parties, or informal award, there cannot be an "acceptance of compensation under an award in a compensation order" within the meaning of §33(b) of the Act.")

or informal,[5] or that the Deputy Commissioner's action can be official or unofficial.[6] Arguments have ensued regarding the subrogation rights of employees and employers as offering protection to them once assignment has occurred.[7] Debate has also centered on the quantum of activity required of the Deputy Commissioner.[8]

Respondent respectfully submits that the foregoing arguments have served to create an obscurity in the statute, which have directed courts' attentions away from

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5. *Grasso v. Lorentzen*, 149 F.2d 127, 129 (2d Cir. 1945) ("Although the award may be informal, [citations omitted]. It must amount to an award by the Deputy Commissioner."); *Liberty Mutual Insurance Co. v. Ameta & Co.*, 564 F.2d 1097, 1102 (". . . an award in a compensation order does not require formal entry of an award *per se*."); *Simmons v. Sea-Land Services, Inc.*, 676 F.2d 106, 109 (4th Cir. 1982) ("Having determined that section 933(b) contemplates an informal award. . .").

6. *Grasso v. Lorentzen*, 149 F.2d 127, 128 (2d Cir. 1945) ("As a result of the amendment there must now be some official action by the Deputy Commissioner establishing an award of compensation in order to make such acceptance an assignment of the employee's cause of action against a third person."); *Ambrosino v. Transoceanic S.S. Co., Ltd.*, 675 F.2d 470, 472 (2d Cir. 1982) ("The amendments recognize the importance of an official informal conference in which an agreement approved by the Department of Labor has the same final and binding effect as a formal compensation order issued after a contested proceeding.")

7. The "acts of ratification" test delineated in *Ameta*, gained support by the Courts' finding that longshoremen had subrogation rights against employers once assignment becomes effective. *Ameta*, 564 F.2d at 1103. Affirming the district court's allowance of an employer to intervene in its employer's action for damages, the Third Circuit stated "it is only the right of action against third persons which an employer foregoes by paying compensation without an award. It's right to reimbursement out of the recovery for the employee's injury remains unaffected." *Mitchell v. The Etna*, 138 F.2d 37, 41 (3d Cir. 1943).

8. *DeMonte v. Shipping Corp. of India, Ltd.*, 476 F. Supp 392, 397 (S.D.N.Y. 1979) ("The action can be informal, such as a simple notation by the Deputy Commissioner in his records showing the disposition he has made of the Plaintiff's claims. [citations omitted] But there must be some action.) *Ameta, supra* at note 7 ("acts of ratification" and "sufficient affirmative action" by the Deputy Commissioner.)

the conclusive, unambiguous statutory language. Congress, in enacting and amending section 33(b) created a provision capable of construction upon its words alone. *Osaka Shosen Kaisha Line v. United States,* 300 U.S. 90. "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Comm. v. GTE Sylvania, Inc.,* 447 U.S. 102, 108 (1980). It is therefore clear that in interpreting the "award language" in section 33(b) that the assignment provision does not become effective until the passage of six months after a longshoreman accepts compensation which has been paid pursuant to an award in a compensation order which has been filed by the Deputy Commissioner, his designee[9] or the Benefits Review Board. In other words, unless the Deputy Commissioner, his designee, or the Board issues an award in a compensation order, an assignment will not occur.

The elements required to cause an assignment of a longshoreman's right of action against a third party tortfeasor are clearly set forth in section 33(b). The requirements are:

1. A longshoreman's acceptance of compensation;
2. which was paid under an award in a compensation order;
3. said order being filed by the Deputy Commissioner or Board;[10] and

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9. 20 C.F.R. 701.301(a)(7) provides: "Deputy Commissioner" means a person appointed as provided in section 39 and 40 of the LHWCA or his designee, authorized by the Director to perform functions with respect to the processing and determination of claims for compensation under such Act and its extensions as provided therein and in this subchapter.

10. For the purposes of the present Brief, and in light of footnotes 2 and 9, Respondent's references to the Deputy Commissioner will include his designees, as authorized by the Director, and references to the Board shall be interpreted as the "Benefits Review Board."

4. the passage of six months from the date of said award in the compensation order, without the longshoreman first filing suit.[11]

The second element poses the controversy between the present parties. What constitutes an "award in a compensation order?" The third element provides a portion of the answer: an award in a compensation order is something which must be filed by the Deputy Commissioner or Board and therefore, cannot be a mere form or series of forms filed by the employer or its insurer.

In that obscurity has been created in the interpretation of section 33(b), a review of the legislative history of section 33(b), from its inception to the present time, as well as a review of the Act, in its entirety, and prior judicial interpretations of section 33(b), is of assistance in defining an "award in a compensation order."

(1) The Legislative History of 33 U.S.C. 933(b).

The Longshoremen and Harbor Workers Compensation Act was originally enacted in 1927, by the Sixty-Ninth Congress. Section 33(b)[12] provided, in no uncertain terms, that the mere acceptance of compensation by a longshoreman operated as an automatic assignment to the employer of all rights the longshoreman may have had against a third person for injuries sustained.

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11. Respondent does not contest that section 33(b) has a six month statute of limitations; the present issue is when this provision commences.

12. The 1927 Act provided: (b) Acceptance of such compensation shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person, whether or not the person entitled to compensation has notified the Deputy Commissioner of his election. 44 Stat. 1421 (1927).

In response to the grave injustice[13] caused by the 1927 Act, the Seventy-Fifth Congress amended section 33(b), effective 1938.[14] By adding the phrase "under an award in a compensation order filed by the deputy commissioner," the legislature's purpose of providing an opportunity to the injured person to consider the effect of electing to receive compensation or instituting suit against the tortfeasor was met.[15] No longer was the mere acceptance of compensation payments sufficient to effect an assignment of an injured longshoreman's claim. The 1938 amendment made it imperative that the compensation be received pursuant to an award in a compensation order filed by the Deputy Commissioner. This stringent addition to section 33(b) of the Act was to "provide payments during the period while the employee [was] unable to

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13. Senate and House Reports provided: "The purpose of this amendment is to remove possible cause of complaint regarding subdivision (b) of section 33 in making the mere acceptance of compensation work automatically an assignment to the employer of all rights of action against the third party tortfeasor. Acceptance of compensation without knowledge of the effect upon such rights may work grave injustice." H.R. Rep. No. 1945, 75th Cong., 3d Sess. §12 (1938); S. Rep. No. 1988, 75th Cong., 3d Sess. §12 (1938).

14. The 1938 Amendment provided: (b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person. 52 Stat. 1168.

15. Senate & House Reports provided: ". . . The assignment of this right of action against the third party might properly be contingent upon the acceptance of compensation under an award in a compensation order issued by the deputy commissioner, thus giving opportunity to the injured person, or to the beneficiaries in the case of death, to consider the acceptance of compensation from the employer with the resulting loss of right to bring suit in damages against the third party, or a refusal of compensation so as to pursue the remedy against the third party alleged to be liable for the injury." H.R. Rep. No. 1945, 75th Cong., 3d Sess. §12 (1938); S. Rep. No. 1988, 75th Cong., 3d Sess. §12 (1938).

earn, when they [were] sorely needed, without compelling him to give up his right to sue a third party when he [was] least fit to make a judgment of election." *American Stevedores v. Porello*, 330 U.S. 446, 456 (1946).

Courts reviewing the 1938 amendment to section 33(b) clearly understood and effectuated the congressional purpose. Consistently, the courts held that something more than the mere acceptance of compensation, i.e. an award in a compensation order filed by the Deputy Commissioner, was needed to effect an assignment of the injured person's cause of action.[16]

Finding that the Act, as amended in 1938, continued to work a hardship on longshoremen by forcing them to take compensation under the Act because of the risks involved in pursuing a lawsuit against a third party, Congress again amended the Act, effective August 18, 1959.[17]

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16. *Grasso v. Lorentzen*, 56 F. Supp. 51 (S.D.N.Y. 1944), *aff'd* 149 F.2d 127 (2d Cir. 1945), *Cert. Den.* 326 U.S. 743 (1946) (Act intended to make assignment effective only when compensation was accepted in accordance with such Act.); *Cupo v. Isthmian Steamship Company, Inc.*, 56 F. Supp. 45 (S.D.N.Y. 1941) (Mere acceptance of compensation is not enough); *Mitchell v. The Etna*, 138 F.2d 37 (3d Cir. 1943) (Need an award in a compensation order filed by the Deputy Commissioner) *Tartaglio v. Cunard White Star Ltd.*, 56 F. Supp. 55 (S.D.N.Y. 1944) (Acceptance of compensation is not equal to an election); *Brusich v. Grace Line, Inc.*, 56 F. Supp. 48 (S.D.N.Y. 1944) (A condition precedent to the effective transfer to employer from employee is the acceptance under an award in a compensation order filed by the Deputy Commissioner).

17. S. Rep. No. 428, 86th Cong., 1st Sess. (1959) provides:

". . . However, in exercising his right to sue a third party for damages under section 33 of existing law, the employee must choose whether to collect the compensation to which he is entitled or to pursue the third-party suit. He may not pursue both courses.

Existing law works a hardship on an employee by in effect forcing him to take compensation under the act because of the

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This amendment added a provision which entitled an injured longshoreman to both accept compensation payments and commence an action against a third party provided the action was instituted within six months "after such award."[18] The 1959 amendment reaffirmed the 1938 amendment which required that a longshoreman could only assign his or her interest in bringing suit against a third party, by accepting compensation under an award in a compensation order filed by the Deputy Commissioner. Therefore, the 1938 language was simply supplemented; the prior understanding of section 33(b), regarding the requirements of an "award" was left intact. Additionally, the 1959 amendment allowed the longshoreman six months after such award to make his or her decision as to whether or not to pursue the claim. The Fifth Circuit succinctly noted, that "The 1959 amendments did not change the nature of the assignment; they merely delayed its operation for six months." *McClendon v. Charente Steamship Company, Ltd.*, 348 F.2d 298, 302 (5th Cir. 1965).

Footnote continued—

risks involved in pursuing a lawsuit against a third party. His compensation under the act is certain but his chances of winning third-party liability suit are uncertain. In these circumstances an injured employee usually elects to take compensation for the simple reason that his expenses must be met immediately, not months or years after when he has won his lawsuit. Circumstances like these are ready made for the unscrupulous who have been known to "stake" an injured employee while pursuing a damage suit—those who, in effect, purchase an injured employee's claim for their own monetary advantage."

18. The 1959 Amendment provided: (b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award. 73 Stat. 391.

Congress made the most recent amendment to section 33(b) in 1972.[19] Only the words "or Board"[20] were added. "Board" is defined as "Benefits Review Board" at 33 U.S.C. 902(20). The 1972 amendment, consistent with the prior amendments, makes it clear that an injured longshoreman has six months from the acceptance of compensation under an award in a compensation order filed by the Deputy Commissioner or the Board in which to file suit against a third party.

Respondent submits that the plain language of section 33(b) should be dispositive of the issue at bar. Congress has amended this provision on three separate occasions. It must be assumed Congress was aware of the legal conflicts arising out of this provision as well as the rights of the various parties. Despite some decisions issuing a utilitarian[21] approach to the administrative logistics in-

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19. 33 U.S.C. 933(b), effective October 27, 1972, P.L. 92-576, §15 (f)-(h), 86 Stat. 1262.

20. The 1972 amendment provided: (b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner or Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

21. The court in *Liberty Mutual Ins. Co. v. Ameta*, 564 F.2d 1097, 1103 (4th Cir. 1977), found in its decision that the filing of certain documents was sufficient affirmative action to constitute an award "logical" in light of its belief that a "stevedore-employer should not be required to controvert every claim for compensation under the Act . . ." Similarly, the Fourth Circuit justified a three part test by stating that the "rule will foster the prompt payment of benefits by eliminating the need for perfunctory contravention by the employer . . ." *Simmons v. Sea-Land Services, Inc.*, 676 F.2d 106, 109 (4th Cir. 1982). However, a district court noted, "while an arrangement which would expedite the "award," and resulting assignment, might, in certain circumstances, be beneficial both to employers and to employees, in that it would permit the employer . . . to proceed with the Court action without superfluous administrative hurdles,

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volved in implementation of benefits under the Act, the plain fact remains that Congress has not removed the award language, and in fact, has bolstered it by adding "or Board." It is clear from the language of the statute and consistent with legislative purpose, that a longshoreman's right to control his or her claim is not assigned until six months have passed *after receiving an award in a compensation order filed by the Deputy Commissioner, his designee or Board*, despite what administrative inconveniences this might pose to employers.

The statutory language removes all doubt regarding the type of compensation required to commence the six months provision. It must be compensation received in a compensation order filed by the Deputy Commissioner, his designee or the Benefits Review Board. This language is not and should not be construed as excess baggage in the statute. It was added in 1938 with good reason—to prevent grave injustice[22]—and it has remained, without dilution, for the same reason.

To ignore this phrase is to ignore legislative purpose and will effectively mandate that when compensation, of any nature, is received a longshoreman must immediately prepare to file suit against the third party, or be forever barred after the expiration of six months from the issuance of such compensation. Such a construction would have the effect of turning back the congressional clock to the pro-

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Footnote continued—

section 33(b) does not in terms specify, and does not by implication suggest, any such procedure." *Dunbar v. Retla S.S. Co.*, 484 F. Supp. 1308, 1311 (D.C.N.Y. 1980). Respondent concurs with the *Dunbar* court. The Dunbar court cuts through policy arguments for enlarging the 33(b) assignment provision and adheres to the specific statutory language. Respondent submits that this is the better and more correct approach to interpreting the questioned provision.

22. *See supra*, Senate and House Reports, note 13.

vision of section 33(b) as it existed prior to the 1938 amendment. This clearly is not the construction of section 33(b) that Congress intended in amending the Act in 1938, 1959, and 1972.

The foregoing history shows that the "award in a compensation order" required by section 33(b) must issue from a Deputy Commissioner or Benefits Review Board.[23] However inconvenient this might be to employers or the Department of Labor is not in issue. Certainly Congress had access to statistics, such as those supplied in the Lodging on Behalf of *Amici Curiae* for the Petitioners. Despite this, Congress did not delete the questioned language, instead it bolstered it. Respondent submits that there can be no question that the six month provision does not commence until a longshoreman has accepted compensation which has been paid pursuant to *an award in a compensation order which has been filed by the Deputy Commissioner or Board.*[24] As such, and consistent therewith, compensation forms filed by employers or their insurers cannot—ever—commence the running of the time provision. To hold otherwise would effectly defeat language and purpose which has remained unchanged since 1938.

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23. *Grasso v. Lorentzen*, 56 F. Supp. 51 (S.D.N.Y. 1943) ("The language seems plain that the award must be made by a Deputy Commissioner"); *Fearson v. Johns-Manville Sales Corp.*, 525 F. Supp. 671, (D.D.C. 1981) (". . . nor was the settlement ever submitted for approval by the Deputy Commissioner, an Administrative Law Judge, or by the Benefits Review Board. The statute clearly requires such approval.")

24. *Brusich v. Grace Line*, 56 F. Supp. 48, 49 (S.D.N.Y. 1944) ("The way in which on its face such compensation shall be accepted, in order to transfer the cause of action to the employer, and thus deprive the employee of any right to maintain suit against the third person, is definitely provided in subdivision (b). In order to accomplish the transfer the acceptance (says the statute) shall be 'under an award in a compensation order filed by the deputy commissioner.' It is solely by this kind of procedure that title to the cause of action for the injury can pass, in literal comformity with the statute, to the employer.")

(2) *The Act as a Comprehensive Scheme.*

In addition to the foregoing argument that legislative purpose provides the answer to the issue raised herein, Respondent contends that the Act, as a whole, provides further guidance.

This Court noted in *Rodriguez v. Compass Shipping Co.*, 451 U.S. 596, 602 (1981), that "The Act provides a comprehensive scheme governing an injured longshoreman's rights against a stevedore and shipowner." *Id., citing Bloomer v. Liberty Mutual Ins. Co.*, 445 U.S. 74, 77-78. This comprehensive scheme is embodied in 33 U.S.C. 901 (1972), *et seq.*, and provides the terms under which an injured longshoreman is entitled to compensation benefits, as well as the limitations placed thereon. Further, the Act imposes upon the various parties both rights and liabilities, and attempts to protect the rights of all the parties.

Initially, the Act provides that "every employer is liable for and shall secure payment" of compensation to his employees regardless of fault. 33 U.S.C. 904(a)(b).[25] However, an employer is not responsible for injuries resulting from intoxication, willfully harmful conduct or suicide attempts. 33 U.S.C. 903(b).[26] The employer's liability under the Act is exclusive and benefits must be paid pe-

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25. 33 U.S.C. 904 (1972) provides: (a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 7, 8, and 9 [33 U.S.C.S. §§907-909]. In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor unless the subcontractor has secured such payment.

(b) Compensation shall be payable irrespective of fault as a cause for the injury.

26. 33 U.S.C. 903(b) (1972) provides: No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another.

riodically, promptly and directly to the longshoreman. 33 U.S.C. 905(a), 914(a).[27]

Compensation shall be paid without award, except where the employer controverts his liability. 33 U.S.C. 914(a). If the employer does controvert his liability, he must do so within fourteen days after knowledge of the injury, by filing a Notice of Controversion with the Deputy Commissioner. This notice must state, among other facts, the grounds upon which the right to compensation is controverted. 33 U.S.C. 914(d).[28] The Deputy Commissioner shall in any case where the right to compensation is controverted, make such investigations, cause such medical examinations to be made or hold such hearings and take

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27. 33 U.S.C. 905(a) (1972) provides: The liability of an employer prescribed in section 4 [33 U.S.C.S. §904] shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the Act, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee.

33 U.S.C. 914(a) (1972) provides: Manner of payment. Compensation under this Act shall be paid periodically, promptly, and directly to the person entitled thereto, without an award, except where liability to pay compensation is controverted by the employer.

28. 33 U.S.C. 914(d) (1972) provides: Right to compensation controverted. If the employer controverts the right to compensation he shall file with the deputy commissioner on or before the fourteenth day after he has knowledge of the alleged injury or death, a notice, in accordance with a form prescribed by the commission, stating that the right to compensation is controverted, the name of the claimant, the name of the employer, the date of the alleged injury or death, and the grounds upon which the right to compensation is controverted.

further action as he considers will properly protect the rights of *all* parties. 33 U.S.C. 914(h).[29] When the Deputy Commissioner has conducted an investigation, he shall issue an order either rejecting the claim or making an award within twenty days of a hearing or within twenty days after notice is given if no hearing is held. 33 U.S.C. 919(c).[30]

If an employer fails to pay an installment of compensation payable without an award within fourteen days after it becomes due, there shall be added to such unpaid installment an amount equal to ten per centum thereof. The ten per centum penalty is excusable by the Deputy Commissioner upon a showing by the employer that the tardy payment was not due to conditions over which he had con-

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29. 33 U.S.C. 914(h) (1972) provides: Investigations, examinations, and hearings for controverted, stopped or suspended payments. The deputy commissioner (1) may upon his own initiative at any time in a case in which payments are being made without an award, and (2) shall in any case where right to compensation is controverted, or where payments of compensation have been stopped or suspended, upon receipt of notice from any person entitled to compensation, or from the employer, that the right to compensation is controverted, or that payments of compensation have been stopped or suspended, make such investigations, cause such medical examinations to be made, or hold such hearings, and take such further action as he considers will properly protect the rights of all parties.

30. 33 U.S.C. 919(c) (1972) provides: Investigations; orders for hearing; notice; rejection or award. The deputy commissioner shall make or cause to be made such investigations as he considers necessary in respect of the claim, and upon application of any interested party shall order a hearing thereon. If a hearing on such claim is ordered the deputy commissioner shall give the claimant and other interested parties at least ten days' notice of such hearing, served personally upon the claimant and other interested parties or sent to such claimant and other interested parties by registered mail or by certified mail, and shall within twenty days after such hearing is had, by order, reject the claim or make an award in respect of the claim. If no hearing is ordered within twenty days after notice if given as provided in subdivision (b), the deputy commissioner shall, by order, reject the claim or make an award in respect of the claim.

trol. 33 U.S.C. 914(e).[31] However, if an employer fails to pay compensation within ten days after an award in compensation becomes due, there shall be added to such unpaid compensation an amount equal to twenty per centum thereof. This amount is mandatory unless stayed by an Order issued by the Board or court. 33 U.S.C. 914(f).[32]

The statutory provisions above outlined clearly show that the Act is a "comprehensive scheme" for the purpose of protecting the rights of all of the parties. *Rodriguez, supra.* Promptly paid compensation benefits are required under a no fault provision. However, the employer may controvert a claim, if for example, the employee was intoxicated or alleges graver injuries than were actually suffered. If the employer controverts a claim and the Deputy Commissioner finds in favor of the claimant, an award in a compensation order will issue. The employer then has ten days in which to commence compensation. Failure to make payment results in a twenty per centum

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31. 33 U.S.C. 914(e) (1972) provides: Additional compensation for overdue installment payments payable without award. If any installment of compensation payable without an award is not paid within fourteen days after it becomes due, as provided in subdivision (b) of this section, there shall be added to such unpaid installment of amount equal to 10 per centum thereof, which shall be paid at the same time as, but in addition to, such installment, unless notice is filed under subdivision (d) of this section, or unless such nonpayment is excused by the deputy commissioner after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

32. 33 U.S.C. 914(f) (1972) provides: Additional compensation for overdue installment payments payable under terms of award. If any compensation, payable under the terms of an award, is not paid within ten days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20 per centum thereof, which shall be paid at the same time as, but in addition to, such compensation, unless review of the compensation order making such award is had as provided in section 21 [33 U.S.C.S. §921] and an order staying payment has been issued by the Board or court.

penalty. However, if an employer does not controvert the award, but does fail to commence compensation within fourteen days after it becomes due, the penalty is only ten per centum. The penalty provisions protect the employer by allowing him sufficient time to either make compensation payments or controvert the claim without penalty. Further the penalty provisions of section 14(e) and 14(f) *supra* provides ample incentives for employer to pay promptly.

The penalty provisions also differentiate between an "award in a compensation order," and payment without an award, in the manner of penalties applicable to each. The ten per centum penalty only applies to compensation payable without an award, whereas the twenty per centum penalty applies only to compensation payable under an award. An award issues after the Deputy Commissioner has conducted an investigation and issued an order, although an investigation may ensue at the Deputy Commissioner's discretion. The resulting conclusion is that awards in compensation orders only issue after the Deputy Commissioner has conducted an investigation, often but not solely, pursuant to a notice of controversion. "The Deputy Commissioner may upon his own initiative at any time in a case in which payments are made without an award . . . make such investigation . . . hold such hearings and take such further action as he considers will properly protect the rights of all parties." 33 U.S.C. 914(h).

The above procedure protects employers, by ensuring that the twenty per centum penalty will not apply unless an award in a compensation order has issued. In all other cases, the ten per centum penalty provision applies. *If* the mere acceptance of compensation by a longshoreman constituted an award in a compensation order, the employer would be liable for a mandatory twenty per

centum penalty ten days after the payment of compensation became due. Such a reading of the Act is incorrect and also would, if true, render the ten per centum penalty provision pointless, as it would not generally have application. Such an interpretation is not justified by the Act, as a comprehensive scheme, or the specific language of the individual provisions, since the act is intended to protect all parties involved. Such a reading imposes greater, mandatory penalties, where lesser, excusable penalties are specifically intended.

Respondent submits that the Act expressly distinguishes between awards in compensation orders and payments of compensation without award, as indicated above via the penalty provision. Further, the former result from investigations conducted by the Deputy Commissioner subsequent to a Notice of Controversion, or the Deputy's discretion, or applications of any interested party. 33 U.S.C. 919(c).[33]

Therefore, employers can obtain an award at any time by application under section 919(c) or by filing a Notice of Controversion and asking for a hearing even while continuing to pay compensation benefits voluntarily, thus avoiding the harsher penalty provisions of the act and thereby establishing a definitive time for the commencement of the running of the statute of limitations; whereby, they will, in addition to the employee, have accurate knowledge of the time under which the employee third party liability rights, if not exercised by the employee, will pass (assign) by law to them. These factors would appear to either have been ignored or not considered in the aforementioned Fourth Circuit Court decisions of *Ameta* and *Larson, supra.*

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33. See *supra*, note 30.

As a result of the Act's differential treatment of employers who fail to timely pay compensation under an award and those who similarly fail to pay compensation without award and the procedural activities necessary to ensure the issuance of an award in a compensation order, there can be no question that the mere acceptance of compensation payments does not equal an award in a compensation order sufficient to activate the assignment provision of section 33(b).

(3) *The Decisions of the Lower Courts.*

Respondents have briefly touched upon the lower court decision relied upon by the Petitioner. Further comment is in order since the Petitioner has placed great weight on the decisions issuing from the Fourth Circuit. In particular, the rules issued in *Liberty Mutual Insurance Co. v. Ameta & Co.*, 564 F.2d 1097 (4th Cir. 1977), *Larson v. Associated Containers Transportation (Australia) Ltd.*, 459 F. Supp. 561 (E.D. Va. 1978) and *Simmons v. Sea-Land Services, Inc.*, 676 F.2d 106 (4th Cir. 1982) are relied upon. These decisions build upon one another and are unpersuasive in that they do not follow the legislative purpose or interpret the Act as a whole. Additionally, they are founded upon inaccurate assumptions.

Presented with an issue identical to the one now raised, and facts strikingly similar, the *Ameta, supra* court after determining that formal awards *per se* are not required by section 33(b) ("the focus should properly be upon some act of ratification, *id.*, at 1102), held at page 1103 that the longshoreman's receipt of four forms[34] is

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34. The four forms are:

1. Form BEC-202 - Employer's First Report of Accident or Occupational Illness; and

(Continued on following page)

sufficient affirmative action by the Deputy Commissioner so as to constitute an award under section 33(b). The court further stated that this result was logical because it did not require an employer to controvert every claim simply to ensure the entry of a formal award in order to preserve the statutory assignment and subrogation rights of the employer.

The *Ameta* decision clearly obscures the meaning of section 33(b) by placing emphasis on considerations outside of it; for example, an employer's potential interest in his statutory assignment and subrogation rights.

As has been repeatedly stated in the foregoing arguments, the legislative history and the express provisions of the Act clearly show that it is a comprehensive scheme, capable of construction upon its specific language. As such, there is no justification for going outside the language to construe the statute.

The act does not provide that an award in a compensation order issues after sufficient acts of ratification or affirmative actions, but rather, it clearly states that such awards issue only after the Deputy Commissioner conducts an investigation.

Further, Congress must be presumed to have balanced the interests of employers and longshoremen when it decided that an award in a compensation order will not issue until an investigation has occurred. Certainly as pointed

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Footnote continued—

2. Form BEC-206 - Payment of Compensation Without Award; and
3. Form No. 6 - Attending Physician's Report; and
4. Form BEC-208 - Compensation Payment Stopped or Suspended.

Id. Liberty Mutual Insurance Co., 564 F.2d at 1101.

out hereinabove, this procedure ensures accurate determination regarding triggering of the statute of limitations and notice of same to all parties. Possibly this procedural step might burden employers attempting to preserve their potential rights, but this is a decision made by Congress, and one which cannot be lightly ignored.

The *Ameta* Court based its conclusion on mistaken facts. It believed that an employer must controvert every claim to protect its lien rights. *Id.*, at 1102 (dicta). As has been shown in section (3) of this argument, an award in a compensation order may result from a controverted claim, but they may also issue at other times. All that is necessary, as a prerequisite, is that the Deputy Commissioner conduct an investigation. Therefore, the *Ameta* holding is based on an inaccurate and misleading fact.

Respondent submits that *Ameta* is contrary to the spirit of the Act, as well as its specific language. *Fearson v. Johns-Manville Sales Corp.*, 525 F. Supp. 671, 675 (D.D.C. 1981). Additionally, its authority must be seriously questioned in light of its reliance upon mistaken information.

Subsequent to *Ameta*, the district court for the Eastern District of Virginia held that the assignment provision of section 33(b) was triggered by the payment of compensation benefits to an injured longshoreman with the "requisite filing of documents and reports with the U.S. Department of Labor." *Larson, supra* at p. 20, at 564. The *Larson* court extensively cited from and relied on the *Ameta* decision. In effect, it set a definitive starting date for the commencement of the six month provision which starting date was the date of acceptance of payments of benefits under the Act, and found its support to do so in *Ameta*.

Expanding upon *Ameta* even further, and in so doing, further reducing a longshoreman's opportunity to consider his or her options, the Fourth Circuit, in *Simmons, supra,* at p. 20, developed a test for determining when an award in a compensation order is created.

1. The employer, having not contravened its liability, initiates compensation payments to the longshoreman;

2. the deputy commissioner files the employer's notice the compensation payments have been initiated; and

3. the longshoreman accepts any of the payments.

Simmons, id. at 109.

Respondent submits that the above test is an affront to Congress and seriously jeopardizes the continuity of the Act. The test serves to eliminate the purpose and intent of the Congress in effectuating the amendments to the Act in 1938, 1959, and 1972, and serves to revert the law to the status which prior to 1938 caused the mere acceptance of compensation payments to create an assignment.

The three elements of the *Simmons* test are activities which are assured of occurring every time a longshoreman files a claim for compensation, unless the employer controverts the claim. In that the very purpose of the Act is to provide prompt compensation for injuries, it can be generally accepted that the employee will accept the benefits offered. Recalling that the employer has a statutory duty to pay compensation and that the penalty provisions gave him an incentive to do so without contravention, it is unlikely that he would forego this obligation. Finally, it can be expected that the Deputy Commissioner would retain and file the employer's notice of compensation commenced since he is the record keeper of claims.

Another disturbing aspect of the *Simmons* test is that the second element required is the filing by the deputy commissioner Form LS-206, "Payment Of Compensation Without Award" (J.A. 48). That form has boldly displayed on the top of the page in dark letters, capitalized, the above indicated caption. The *Simmons* test would include the issuance of this form as one of the three necessary elements for determining just when an award in a compensation order is created. Surely the very boldly displayed title, standing alone, indicates the absence of an award. How could this possibly be considered to be consistent with the Congressional purpose to avoid unwitting assignments of employees' rights when the test espoused within the *Simmons* holding contains such a form which in effect informs the employee that compensation is being paid to him, *without an award?*

The three elements of the *Simmons* test are nothing more than requirements already imposed upon the respective parties. They do nothing to ensure employees have knowledge of their rights and liabilities and if upheld would create a serious impediment to the comprehensive Act by rendering many of its provisions ineffective, such as the ten per centum penalty provision. In particular, the final three amendments to section 33(b), those which solidified the rights and liabilities of longshoreman and their employers, would be had for naught.

The foregoing cases attempt to reduce the stringent assignment rule set forth in section 33(b) by inferring awards in compensation orders. Inferring awards in compensation orders, in addition to being contrary to the very words of section 33(b), violates Congressional purpose by effectively denying a longshoreman an opportunity to make an intelligent, informed decision regarding future action for his or her injuries until he or she has learned

the full extent of his or her injuries, as well as the compensation he or she can expect. Until full appraisal occurs, a longshoreman is in no position to make an informed decision as to whether or not to pursue a third party suit. *Verderame v. Torm Lines*, 670 F.2d 5, 7 (2d Cir. 1982). This is especially true when compensation is being received for an indeterminate period. In this situation, a claimant should not be forced, by judicial inference, to quickly file suit prior to knowing the extent of his or her injury. Such a requirement defeats the Congressional purpose of providing sufficient time in which to make an informed decision, which purpose has evolved over many years and through three amendments to the Act to ensure that result. Respondent contends that the assignment provision does not commence until the longshoreman receives a definite notice of full compensation via actual notice of an award in a compensation order. *See*: *DeMonte v. Shipping Corp. of India, Ltd.*, 476 F. Supp. 392 (S.D.N.Y. 1979); *Theodore v. Moore McCormack Lines, Inc.*, 516 F. Supp. 25 (S.D.N.Y. 1981); *D'Amico v. Cia De Nav. Mar. Netumar*, 677 F.2d 249 (2d Cir. 1982).

Respondent submits that the aforementioned definite notice may be either formal or informal provided it is certain and capable of advising, or at the very least, actually notifying a longshoreman of an official action by the deputy commissioner or Board. Section 33(b) does not expressly indicate that the order be formal, and in light of the administrative burdens provoked by the number of claims filed annually, Respondent would certainly defer to the many courts which have held that informal orders comply with section 33(b).[35] However, Respondent does not agree that the order may unofficially

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35. *See supra*, Note 5, and accompanying text.

issue. Once again the very words of the statute should be reviewed, ". . . filed by the Deputy Commissioner or Board. . ." 33 U.S.C. 933(b). The words, and therefore Congress, expressly require the award in a compensation order be filed only by the Deputy Commissioner or Board acting in their respective official capacities. The statute is not satisfied by an unofficial filing—since there can then be no guarantee the order has been approved or serves to adequately notify the longshoreman of the commencement of section 33(b)'s assignment provision.

What is an award in a compensation order? Respondent submits that it is a formal or informal, official, order approved and filed by the Deputy Commissioner or Board which has the effect of adequately notifying an injured longehoreman of the commencement of the section 33(b) assignment provision. This definition is consistent with the spirit of the Act, as well as its express words. It comprehends the burdens placed on employers and the Office of Workers Compensation Programs while avoiding the grave injustices[36] caused by insufficient notice and uninformed decisions.

Respondent submits that the foregoing makes it quite clear that the mere acceptance of compensation payments is insufficient to commence the section 33(b) assignment provision. This is not a novel contention, and is one which was first stated by this Court in *American Stevedores v. Porello, supra,* 330 U.S. at 456. Such a rule is important to maintain so that longshoremen are guaranteed sufficient time to fully discover their injuries and opportunity to consider their remedies. Of equal importance, it should be noted that the various provisions of the Act represent efforts by Congress to protect rights of all of

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36. *See supra,* Senate and House Reports, Note 13, and accompanying text.

the parties. Whatever administrative hardships might arise from the Act result from Congress' purpose in creating a comprehensive scheme for the protection of all the parties. *Kirsch v. Bangladesh Shipping Corp.*, 544 F. Supp. 83, 88 (E.D. Pa. 1982).

(4) *The Present Matter*

Joseph Duris, Respondent, has yet to receive an award in a compensation order. His employer has paid compensation benefits without controvention and has caused various forms to be filed with the U.S. Department of Labor, but the Deputy Commissioner or Board have not issued any responses, nor any form entitled "Order." Due to the extent of litigation, essentially pleadings in nature, complete evidence regarding Respondent's claim file is not in the record, but this Honorable Court is requested to note that Respondent's compensation claim continues to be active. The deputy commissioner has not completed any investigation. As of this date, Respondent has not been advised of the full amount of compensation he will receive for his injuries, indeed negotiations regarding a lump sum payment are currently ongoing between Mr. Duris and the insurance carrier for his employer.

Two key forms Respondent has received are mentioned in the record. The first, Form LS-206, is entitled "Payment of Compensation Without Award" (J.A. 48). A careful review of this form clearly shows that it is not an order. Further, it was filed by Respondent's employer, not the Deputy Commissioner or Board. Finally, by its very wording, it is clearly outside the statute as it expressly states that the compensation is paid "without award." Certainly, on its face, it provides no notice to the longshoreman that by accepting such compensation "without award," he is triggering the short six month

statute of limitations. It is clear that the amendments were intended by Congress to create a situation where an injured longshoreman would have clear notice that something had occurred which might result in his loss of right to bring a third party action and that his rights would be assigned to his employer. This was the essential concern of the court below. The receipt of the Form LS-206 "Payment of Compensation Without Award" is obviously not adequate to provide such notice, particularly when the law requires payment of compensation *under an award.*

The second form noted in the record is Form LS-208 (J.A. 49). This form is entitled "Important Notice to Employee" and gives notice that Respondent has received a total amount of temporary disability. Form LS-208 is not an order, but rather a notice of compensation already paid.[37] It does not serve to notify the claimant of the commencement of the assignment provision. This is especially true in Respondent's case where he actively continues to pursue his claim for compensation benefits.

The Sixth Circuit, after reviewing section 33(b), the Congressional purpose and the facts before it held that something more was required than the mere receipt of compensation benefits to trigger the assignment provision of section 33(b) and therefore Respondent was not time barred from bringing the present action. This holding is consistent with the spirit and language of the Act. Compensation orders cannot be inferred, because in so doing, the longshoreman's statutory right to make an informed

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37. Form BEC-208, which is mentioned in Petitioner's brief, is the predecessor of Form LS-208, and was used for the same purpose. A copy of the Form BEC-208 applicable to Mr. Duris is attached hereto and marked as Exhibit A, by agreement of the parties, in that it was not available at the time of compilation of the Joint Appendix. Additionally, Form BEC-208A is attached hereto and marked as Exhibit B, by agreement of the parties.

decision is denied. Compensation orders may not result from an arbitrary number of forms filed by employers as this ignores the statutory language which requires the order be filed by Deputy Commissioner or Board. Finally, the administrative hardships which may or may not exist for the employer or the Deputy Commissioner are not a valid consideration as Congress must be presumed to have considered the consequences administratively. The Deputy Commissioner or Board must file an award in a compensation order. No other activity will satisfy section 33(b)'s assignment provision.

(b) The Issue of a Conflict of Interest Between the Injured Longshoreman and His Employer Has Not Been Raised in This Case and Therefore Has No Critical Application to the Essential Reasoning of the Court Below.

Respondent concurs in Petitioner's presentation of the law regarding the conflict of interest exception to section 33(b), which was initiated by this Court in *Czaplicki v. The Hoegh Silvercloud,* 351 U.S. 525 (1956). In that case, both the employer and the third party allegedly responsible for the longshoreman's injuries were insured by the same insurance company. It was later stated by this Court that "because the carrier would be responsible for both prosecuting and defending any third-party claim, no one other than the injured longshoreman had sufficient interest in the claim to bring suit." *Rodriguez v. Compass Shipping Co.,* 451 U.S. at 606. In short, this Court created an exception to section 33(b) when a longshoreman's "rights of action were held by the party most likely to suffer were the rights of action to be successfully enforced." *Czaplicki v. The Hoegh Silvercloud, supra,* 351 U.S. at 530.

Although the validity of this exception has been questioned on numerous occasions, this Court in *Rodriguez v. Compass Shipping Co.*, 451 U.S. 596, 618 (1981), determined, after reviewing section 33(b) and its amendments, "Whatever the continued validity of our decision in *Czaplicki*, a question we need not and do not decide today, these cases do not involve "the peculiar facts" on which *Czaplicki* was based." It should be noted, however, that the *Czaplicki* decision is not far reaching and is basically limited to the facts of that case. *Rodriguez v. Compass Shipping Co., Ltd.*, 617 F.2d 955, 961 (2d Cir. 1980). As such, an employee would only on rare occasions be able to sustain the necessary burden of proof to invoke the exception.

The present matter also does not require this Court to decide the continued validity of *Czaplicki*. A conflict of interests problem herein is not evidenced by the record and has not been raised at any time.

Respondents respectfully submit the second question presented by the Petitioner is not in issue at all in this case. There was no allegation before the court below that there was a "conflict of interest between the injured longshoreman and his employer which precludes the operation of the assignment provisions of section 33(b) of the Act." (Petitioner's brief p. 21). There was no record made in point. The court below had no information available to know whether the *Czaplicki* exception would be applicable or not.

It is submitted that the Petitioner considerably overstates the court's concern regarding the conflict of interest question and in so doing obscures the true reasoning of the court below regarding their declination to follow the decisions of *Liberty Mutual* and *Larson, supra* at p. 22.

The court below did not base its opinion on a conflict of interest potentially existing in this matter. All that the court below held was that it was unwilling to expand its construction of section 33(b) in light of the "obvious disincentives" an employer has to bring an employee's action (J.A. 45-46). The Court was not addressing the conflict of interest exception, rather it was consistently applying its rule that "the mere receipt of compensation benefits does not trigger the assignment provision of section 33(b)" (J.A. 46). The fact that an employer may have disincentives to bring his employer's suit is consistent with the Sixth Circuit's finding that receipt of compensation is insufficient to effect an assignment, and awareness by the longshoreman as to the impact upon his rights by acceptance of benefits is essential to meet the Congressional purpose.

An expansive interpretation of the assignment provision coupled with a virtually impossible burden of proof to show an exception to it would effectively deny a longshoreman an opportunity to accept compensation benefits and recover, via tort principles, for his or her injuries. This is especially true where the employer will not bring the assigned action. The Act expressly allows a longshoreman to receive compensation and recover damages against a third person. 33 U.S.C. 933(a). If the action is assigned and the employer refuses to institute proceedings and if the *Czaplicki* exception does not apply, the longshoreman is conclusively precluded from receiving tort damages. The protection a longshoreman is offered against such an occurrence is a strict interpretation of section 33(b), as aforedescribed in the prior arguments. A strict interpretation, which is warranted by both the express words of the statute and the Congressional purpose, considers the conflict of interest arguments and balances the interests of all parties.

In holding as they did, the court below did not rely on conflict of interest arising in the present matter but rather, considered the importance of protecting the rights of all parties and the purpose of the Act. A contrary holding would force a longshoreman to make an election of remedies—an old principle, Congressionally eliminated in 1938.

The court below specifically stated in point,

> Furthermore, we believe that a broad interpretation of section 33 would vitiate the policy behind its narrowly precise language. Congress might well have sought to assign away an employee's claim only in those cases where the injured longshoreman is likely to be cognizant of the statutory assignment. Although not strictly an election of remedies, the loss of one's personal injury action through an assignment is not without potentially substantial consequences. Once the assignment has been effected, the employee loses all control over the action. Should the employer decide not to sue, the claim will expire. *Rodriguez v. Compass Shipping Co., Ltd.*, 451 U.S. 596 (1981). Unwilling employees should not suffer this consequence. Indeed, the "award" language was added to the statute in 1938 to prevent exactly that occurrence. H.R. Rep. No. 1945, 75th Cong., 3d Sess. 9; *Rodriguez, supra*, at 605. Prior to 1938, assignment occurred immediately upon the acceptance of compensation. Appellee's position would return the Act to its pre-1938 form with the single added protection of a six month period in which the employee, who has done no more than passively accept benefits, may or may not learn of the impending loss of his claim. (J.A. 43-44.)

The Appellate court's reference to a conflict of interest concern is from a practical standpoint made in response to the rebuttal argument propounded by the Petitioners as stated in this Court's opinion (J.A. 44), where the Petitioners maintain that an informed decision on the employer's part is, "not critical because in any instance where the injury can be traced to a negligent third party, the employer's interest in recovering the compensation paid will simultaneously protect the rights of the employee. . ." (J.A. 45).

It is respectfully submitted that the court's response was to the fallacy of the above arguments and their concern was being expressed that a conflict of interest problem could arise. A thorough reading of the Sixth Circuit opinion reflects that the court was not "greatly influenced by the doctrine of the conflict of interest," as the Petitioner represents (Petitioner's brief p. 21). The Petitioner in quoting the court below neglects to note that the court's comments relative to their concern regarding this conflict of interest question were, as indicated above, in response to the rebuttal position of the Petitioner to the court's reasoning as to why payment of a claim to an award is of value to both parties which reasoning was as follows:

> In contrast, where a claim has been paid pursuant to an award, the employee, by virtue of the claim's contravention, is likely to have been brought into sufficient contact with the statute so as to ensure some cognizance of the assignment provision. Thereafter, the employee can make an informed decision. If his employer, or its insurance carrier, appears willing to maintain the action, he may allow the right to pass, knowing that the employer is entitled to recover fully on his claim. This, perhaps, is the favored result in

light of the employer's greater ability to maintain a legal action. Alternatively, the employee will realize that he must act rather quickly or risk losing the right which the court below rendered its decision in the case

It is respectfully submitted that clearly the basis upon which the court below rendered its decision in the case at bar was to foster the Congressional purpose by literal and strict interpretation of the statute as it evolved to its present form by Congressional action. The "purposeful use of the term award" (J.A. 41) was of critical concern to the court. The court below was concerned primarily, as was Congress, that an employee under the Act not unwittingly forfeit his right to pursue a third party action and that an overly liberal construction of the obviously precise language of the statute would create conditions conducive to such a forfeiture of rights.

Petitioners would "paint the picture" that the court below principally relied upon the conflict of interest question in rendering its decision. This is simply not the case. The *Czaplicki* situation has no role in the interpretation of the provisions of section 33(b) in the case at bar.

CONCLUSION

Based on the foregoing arguments, law and history Respondent respectfully requests this Honorable Court to affirm the decision of the court below.

Respectfully submitted,

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EXHIBIT A

Form Approved, Budget Bureau No. 44-R091.3

U.S. DEPARTMENT OF LABOR
BUREAU OF EMPLOYEES' COMPENSATION

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION PROGRAM

COMPENSATION PAYMENT STOPPED OR SUSPENDED

1. BEC CASE NUMBER: 9 4012
2. CARRIER'S NUMBER: 211-5E 3862

INSTRUCTIONS: This notice must be filed with the Deputy Commissioner within 16 days after stoppage or suspension of compensation. If payments have been stopped temporarily, or are being modified, and you intend to reinstate payments shortly, or are continuing payments, so indicate in Item 11, giving reasons.

3. NAME AND ADDRESS OF EMPLOYEE (Please print in brackets below.)

Joseph Duris
1218 Hirzel, Apt. B
Toledo, Ohio 43605

NOTE
Retain only copies 2 and 3.

Send copies 1, 4, 5, and 6 to the Deputy Commissioner who will forward employee's copies to him.

4. NAME OF EMPLOYER: Toledo Overseas Terminal
5. ADDRESS OF EMPLOYER: 3319 St. Lawrence Drive, Toledo, OH
6. DATE OF INJURY: 05-19-75
7. DATE EMPLOYEE FIRST DID NOT WORK BECAUSE OF INJURY: 05-19-75
8. DATE PHYSICIAN FOUND EMPLOYEE ABLE TO RETURN TO WORK: 04-22-77
9. DATE EMPLOYEE RETURNED TO WORK: 04-22-77
10. AVERAGE WEEKLY WAGE $ _____ (Maximum compensation rate—$170.00 per week) MULTIPLIED BY ⅔ = COMPENSATION RATE $ 74.57 (maximum)
11. GIVE REASONS WHY PAYMENTS HAVE BEEN STOPPED OR SUSPENDED: Claimant has returned to work.
12. DATE OF THIS NOTICE: 04-29-77
13. DATE LAST PAYMENT MADE: 04-26-77

14. LIST ALL DISABILITY PAYMENTS

TYPE OF DISABILITY (a)	FROM (Mo., day, yr.) (b)	TO (Mo., day, yr., continued) (c)	AMOUNT PAID PER WEEK (d)	NUMBER OF WEEKS PAID (e)	TOTAL (f)
TEMPORARY TOTAL	05-19-75	04-21-77	74.57	98 4/7	7,516.65
TEMPORARY PARTIAL					
TEMPORARY PARTIAL					
PERMANENT PARTIAL (Loss schedule)					
PERMANENT TOTAL					
PERMANENT PARTIAL (Schedule loss (usual disfigurement))	PERCENT	PART OF BODY			
REPORT ON THIS LINE PAYMENT FOR DIFFERENT PERIOD OR RATE THAN GIVEN IN PREVIOUS LINE				TOTAL →	7,516.65

CC to cc and Gallent
5/3/77 H

15. LIST ALL PAYMENTS MADE ON ACCOUNT OF DEATH

a. NAMES OF DEPENDENTS	b. AMOUNT	c. OTHER EXPENSES	d. AMOUNT
		FUNERAL EXPENSE	
		NO DEPENDENTS—PAID TO TREASURER U.S.	
		TOTAL (Cols. b + d) →	

16. NAME OF INSURANCE CARRIER OR SELF INSURED EMPLOYER: Niagra Fire - Underwriters Adjusting Co., 3450 W. Central, Toledo, Ohio 43606

17. SIGNATURE OF PERSON AUTHORIZED TO SIGN FOR CARRIER: R. Dale Gilliam
18. TITLE OF PERSON WHOSE SIGNATURE APPEARS IN ITEM 17: Claims Supervisor

Form SEC-208 (Formerly Form US-208, which is obsolete) 1961 — DEPUTY COMMISSIONER

Office-Supreme Court, U.S.
FILED
APR 15 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-502

In the Supreme Court of the United States

October Term, 1982

PALLAS SHIPPING AGENCY, LTD.,
Petitioner,

vs.

JOSEPH DURIS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENT

FRANK W. CUBBON, JR.
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENT

Pursuant to Rule 35.5 of the Rules of the Supreme Court of the United States, Respondent, Joseph Duris, respectfully presents the following authorities and intervening matters, which were not available in time to have been included in his brief in chief:

I. Recent Case Authority Supportive of Respondent's Position.

In particular reference is made to that portion of Respondent's Brief (entitled "(3) The Decisions of the Lower Courts," at pages 20-27), discussing the various interpretations of Section 933(b) of the Longshoreman and Harbor Workers Compensation Act. Respondent

would respectfully submit the following two cases decided subsequent to the filing of his brief. The following cases support Respondent's contention that the mere acceptance of compensation benefits does not trigger the assignment provision of Section 933(b).

Carey v. Crane Service Company, No. 81-991 (D.C. Dist. Ct. App., 2-16-83) (Appendix A). The *Carey* Court, subsequent to a thorough review of the history and specific wording of the Longshoreman and Harbor Workers Compensation Act, reversed a dismissal of Appellant's Complaint, in a well reasoned opinion. The Court stated at pages 18-19, "The Appellants merely accepted compensation which was offered without benefit of an award and to which they were seemingly entitled. To allow assignment of their claim based on those facts would surely violate the Longshoreman and Harbor Workers Compensation Act's statutory purpose, and would be inconsistent with other provisions of the Act."

MacKenzie v. Caldwell, No. 82-218 Civ-J-M (M.D. Fla., 3-9-83) (Appendix B). The *MacKenzie* Court, on the issue of the six-month limitation period stated in Section 933(b) of the Act, denied the Defendant Shipping Company's Motion for Summary Judgment. The Summary Judgment Motion was opposed by the injured longshoreman as well as his employer. The Court, in expressly rejecting *Simmons v. Sea-Land Services, Inc.*, 676 F.2d 106 (4th Cir. 1982) and *Liberty Mutual Ins. Co. v. Ameta & Co.*, 564 F.2d 1097 (4th Cir. 1977), ruled on the basis of the decision of the Sixth Circuit Court of Appeals in the present matter in deciding that "the overwhelming weight of authority supports Plaintiff's position" that no formal award had been entered and therefore, no assignment had occurred.

II. Issuance of the First and Only Award in a Compensation Order Filed by the Deputy Commissioner in This Case.

With reference to pages 27-29 of Respondent's Brief, titled "(4) The Present Matter," wherein Respondent stated, "Joseph Duris, Respondent, has yet to receive an award in a compensation order," Respondent respectfully submits that since the filing of Respondent's Brief there has been filed by the Deputy Commissioner the first and only Award in a Compensation Order in the Joseph Duris Workmen's Compensation case. Respondents herewith submit a two page Affidavit of Thomas C. Hunter, Assistant Deputy Commissioner for the 10th Compensation District of the United States Department of Labor, Employment Standards Administration, Office of Worker's Compensation Program (Appendix C). Attached to Mr. Hunter's Affidavit is the two page Compensation Order, Award of Compensation which the Affiant states is the *only* compensation paid to Respondent, under an award in a Compensation Order filed by the Deputy Commissioner in this case.

Respondent would respectfully request this Court to note said Compensation Order was filed by the Deputy Commissioner on February 25, 1983.

Respectfully submitted,

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APPENDIX A

Decision of the District of Columbia Court of Appeals in Carey v. Crane Service Company

No. 81-991

DISTRICT OF COLUMBIA COURT OF APPEALS

HARVEY R. CAREY, *et al.*,
Appellants,

v.

CRANE SERVICE COMPANY, INC., *et al.*,
Appellees.

Appeal from the Superior Court of the District of Columbia

(HON. PAUL F. MCARDLE, *Trial Judge*)

(Argued April 22, 1982 Decided February 16, 1983)

Before NEWMAN, *Chief Judge*, and NEBEKER and PRYOR, *Associate Judges*.

NEBEKER, *Associate Judge*: This is an appeal from a judgment dismissing the complaint in summary judgment context. The case was filed by Harvey and Trithenia Carey, appellants, seeking damages for multiple permanent injuries sustained by Harvey Carey while working in the regular course of his employment with the C. J. Coakley Company.[1] Pursuant to D.C. Code 1973, § 501,

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1. Carey was employed as a drywall laborer. On the day of the accident, he was at a construction site several stories above ground level removing platforms of sheet rock which had been hoisted up on a flying jib mounted on a crane. As he attempted to stabilize the jib for its retraction through a "window opening,"

(Continued on following page)

[2] Carey was covered by the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq.* (1976) (hereinafter LHWCA), at the time of his accident.[2] Section 914(a) of the LHWCA requires that compensation "be paid periodically, promptly, and directly to the person entitled thereto, *without an award,* except where liability to pay compensation is controverted by the employer." (Emphasis added.) In compliance with § 914(a), the Coakley Company's insurance carrier promptly began Carey's compensation payments, filing at the same time the necessary standardized form with the Office of Workers' Compensation. That form computed Carey's payments according to the percentage formula set forth in § 908 of the LHWCA. Carey continues to receive [3] compensation as thus calculated. Because it was undisputed that Carey's injuries occurred in the regular course of his employment, the Coakley Company did not contest its liability.

Section 933(a) of the LHWCA provides that an injured worker who accepts workers' compensation can also

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Footnote continued—

his sleeve caught and he was pulled off the structure. He fell approximately 70 feet into a concrete-bottomed air vent shaft. He suffered multiple fractures to his ribs and legs resulting in permanent injury.

2. The Longshoremen's and Harbor Workers' Compensation Act was originally enacted by Congress in 1927. It was made applicable to workers in the private sector of the District of Columbia when Congress passed the Workmen's Compensation Act of 1928, Pub. L. No. 70-419, § 1-3, 45 Stat. 600 (1928) (codified at D.C. Code 1972, §§ 36-501, -502). Effective October 1, 1981, the District of Columbia Council enacted the Workers' Compensation Act of 1979, D.C. Law 3-77, 27 D.C. Reg. 2503 (1980) (codified at D.C. Code 1981, §§ 36-301 *et seq.*), and at the same time repealed all earlier workers' compensation legislation applicable to the District. This court upheld the 1979 Act in *District of Columbia v. Greater Washington Central Labor Council,* D.C.App., 442 A.2d 110 (1982). Because events in this case occurred prior to the passage of the Act of 1979, appellants' appeal must be examined within the guidelines established for the Longshoremen's and Harbor Workers' Compensation Act.

seek to recover against a third party who may be liable in damages.[3] It is not necessary for the injured worker to elect whether to receive compensation or to recover against the third party. However, § 933(b) states:

> Acceptance of such *compensation under an award in a compensation order* filed by the deputy commissioner or Board *shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.* [Emphasis added.]

Two years after Carey's injury, appellants initiated this suit in negligence against the Crane Service Company, Inc. and the Hutchison Crane Company, Inc., appellees, as third-party tort-feasors. The trial court dismissed the suit. The court held that the right to recover damages from appellees was assigned to the Coakley Company when appellants failed to file their action within [4] the first six months of Carey's workers' compensation payments as required by § 933(b). However, § 933(b) also requires that an injured worker accept "compensation under an award in a compensation order." Carey merely accepted the compensation payments due him which the insurance carrier promptly initiated as required by § 914 (a) and which Carey's employer never contested. Such payments are "not compensation under award in a compensation order." Consequently, the six-month non-assignment period has not tolled. The judgment is reversed

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3. Section 933(a) provides:

> If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

and the case is remanded with instructions to reinstate the complaint and for further proceedings.

On the day following Carey's accident and qualifying injuries, his employer filed Form BEC-202 (Employer's First Report of Accident or Occupational Illness) with the proper government offices, and on April 7, his employer's insurance carrier commenced disability compensation payments and filed Form BEC-206 (Payment of Compensation Without Award) with the deputy commissioner for this compensation district. As required by § 908 of the LHWCA, Form BEC-206 computed Carey's compensation at 66⅔ per centum of his average weekly wage. No other order awarding Carey disability benefits was ever entered by the Benefits Review Board or the deputy commissioner. Carey continues to receive and accept compensation as provided by Form BEC-206. His payments have never been controverted.

On September 5, 1979, approximately thirty months after the accident, appellants filed this suit against appellees as third-party tort-feasors. Appellants alleged that the negligent operation of a crane by appellees' employee was the proximate cause of Carey's injuries. The trial court granted appellees' motion for summary judgment citing *Rodriguez v. Compass Shipping Co. Ltd.*, 451 U.S. [5] 596 (1981), as dispositive. *Rodriguez* held that injured workers who are awarded workers' compensation cannot pursue their third-party claims after the statutory six-months expire.[4] However, the Supreme Court in

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4. *Rodriguez* consisted of three consolidated cases. Each employee was a longshoreman who was injured aboard ship in the regular course of his employment and received compensation from his stevedore employer. After the respective six-month periods expired and the stevedores failed to pursue the assigned claims against the shipowners, the longshoremen filed their own third-party suits. The District Courts dismissed the actions by

(Continued on following page)

Rodriguez expressly chose not to address the issue which is presented in this case, *i.e.*, whether payments of "compensation without an award" but in compliance with the LHWCA constitute "compensation under an award in a compensation order" as contemplated by § 933(b) of the LHWCA.[5] Because this issue is one of first impression in [6] this jurisdiction and requires the interpretation of § 933(b), it is necessary to begin by reviewing the LHWCA's 55 year history and § 933(b)'s several amendments.

Footnote continued—

reason of the longshoremen's failure to bring suit within the statutory six months and the Court of Appeals affirmed. In upholding the lower courts, the Supreme Court stated:

> The only conditions precedent to the statutory assignment are the acceptance of compensation pursuant to an award in a compensation order and the passage of the required period of 6 months. These conditions are admittedly satisfied in these cases. The statutory assignment encompasses "all right" of the employee to recover damages from a third party. These words preclude the possibility that the assignment is only a partial one that does not entirely divest the employee of his right to sue, or that the employee and the employer possess concurrent rights to sue in the post-assignment period. When the [§ 933(b)] assignment occurs, it transfers the employee's entire right to commence a third-party action to the employer. [*Id.* at 603.]

5. In *Rodriguez* two of the injured workers and their employers agreed to settlements during informal conferences convened by the Office of Workers' Compensation Programs following the stevedores' controversion of the workers' claims for compensation. 33 U.S.C. § 908(i) provides for settlement agreements when they are in the best interests of the injured employee. *See also* 20 C.F.R. §§ 702.241, -.242, -.311 to -.315 (1980). No formal orders were entered for the workers although 20 C.F.R. § 702.315(a) requires that settlement agreements be embodied in memoranda or formal compensation orders and filed with the deputy commissioner. At trial, the workers argued that § 933(b) of the LHWCA did not apply to them because they had not accepted "compensation under an award in a compensation order filed by the deputy commissioner or Board." The District Courts rejected the workers' arguments, and the Supreme Court specifically stated that its order granting the petition for certiorari did not extend to that question. The third worker did not raise the issue. *Rodriguez, supra* at 598-99 n.3.

When interpreting any portion of an act, the statutory meaning of a term or phrase must "be derived not from the reading of a single sentence or section, but from consideration of [the] entire enactment against the backdrop of its policies and objectives." *Don't Tear It Down v. Pennsylvania Ave. Dev. Corp.*, 206 U.S.App.D.C. 122, 128, 642 F.2d 527, 533 (1980). Ever since the LHWCA's inception in 1927, its purpose has been to secure expeditious compensation independent of proof of fault for injured workers with limited, determinative liability for employers.[6] *See DiNicola v. George Hyman Construction*, D.C.App., 407 A.2d 670, 672 (1979). When the statute was first enacted, the worker could elect between the certain recovery of compensation from his employer or the less certain, but probably more generous, remedy of an action for damages against a negligent third party. However, [7] § 933(b) of the original act provided that the employee's election to accept compensation effected an immediate assignment to the employer of the employee's cause of action for negligence by third parties. The section read:

> Acceptance of such compensation shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person, whether or not the person entitled to compensation has notified the deputy commissioner of his election.

Nothing more than acceptance of compensation was required to evidence the employee's election. He did not have the option of compensation and a suit against a third party. *See Rodriguez, supra* at 604.

In 1938, Congress enacted a procedural change to § 933(b) in order to protect employees from the harsh

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6. Longshoremen's and Harbor Workers' Compensation Act of 1927, Pub. L. No. 69-803, 44 Stat. 1424 (1927).

consequences of an improvident election.[7] The amended section stated:

> Acceptance of such compensation *under an award in a compensation order filed by the deputy commissioner* shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person. [Emphasis added.]

For a few years there was disagreement about what constituted "compensation under an award in a compensation order." Third parties and employers who had been impleaded by third parties for indemnification purposes argued that mere acceptance of compensation still operated as a conclusive election not to sue. However, in 1945 the [8] Second Circuit addressed the issue in *Grasso v. Lorentzen,* 149 F.2d 127 (2d Cir.), *cert. denied,* 326 U.S. 743 (1945).[8] The court stated:

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7. Act of June 25, 1938, ch. 685, 52 Stat. 1168.

8. In *Grasso v. Lorentzen, supra,* a dispute arose over the continued disability of the claimant. An informal conference was held by the claims examiner and he reduced his recommendations to memorandum form and placed them in the official file. The memorandum recommended, but did not require or approve, payment of additional compensation. Nevertheless, the insurance carrier paid the additional recommended sums and the claimant accepted them.

Thereafter, the claimant filed suit to recover damages for personal injuries and the defendant-shipowner argued that the suit was barred under 33 U.S.C. § 933(b) because the claimant had accepted compensation pursuant to a "compensation order" (the memorandum dictated by the claims examiner after the informal conference). The district court disagreed and the court of appeals affirmed holding that the placement of the claims examiner's memorandum in the file did not constitute "an award in a compensation order" because it was advisory and did not constitute official action. *See Liberty Mutual Ins. Co. v. Ameta & Co.,* 564 F.2d 1097, 1102 (4th Cir. 1977). We note that *Grasso, supra,* was written to address the unique circumstances faced by the employee prior to the 1959 amendment of the Act. *See infra.* As such, it would no longer appear to be good law in at least the Second Circuit. *See Rodriguez v. Compass Shipping Co. Ltd.,* 617 F.2d 955, 959 (2d Cir. 1980).

> Before the statute was amended in June 1938, acceptance of compensation was enough under § 933(b) to operate as an assignment to the employer of the employee's cause of action against a third party, and thereafter there could be no election under § 933(a) to sue rather than to receive compensation. *But after the amendment the phrase "acceptance of compensation" in § 933(b) was modified by the words "under an award in a compensation order filed by the deputy* [9] *commissioner." As a result of the amendment there must now be some official action by the Deputy Commissioner establishing an award of compensation in order to make such acceptance an assignment of the employee's cause of action against a third party.* Although the award may be informal, it must amount to an award by the Deputy Commissioner. The language and the legislative history of the amendment of 1938 show that it was intended to make the assignment effective only when compensation was accepted in accordance with such an award. [*Id.* at 128-29 (emphasis added) (citations omitted).]

Two years later the Supreme Court examined the issue and also held that the mere acceptance of compensation, without an award, does not preclude an injured worker from filing against a third-party tort-feasor. *American Stevedores, Inc. v. Porello,* 330 U.S. 446 (1947).

During that same period, workers' compensation for longshoremen and harbor workers and the admiralty doctrine of seaworthiness are finally interwoven. That was an important juncture for the LHWCA. Prior to 1946, a longshoreman could only sue a third-party shipowner for negligence. The shipowner's "warranty of seaworthiness" for his vessel, which covered seamen and imposed

virtual strict liability on the shipowner, was not extended to longshoremen as they were not employed by the shipowner.[9] A longshoreman was considered an invitee [10] on board the ship and the only duty owed by a shipowner to a longshoreman was one of reasonable care. Annot., 44 A.L.R. 1025 (1926). However, in *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946), the Court broke with that tradition and held that a shipowner's liability for any "unseaworthiness" in his vessel extended to longshoremen and harbor workers.[10] Having thus opened the door for third-party suits against shipowners based on strict liability, the Court laid the groundwork for *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124 (1956), which paved the way to yet another amendment to § 933(b) of the LHWCA.

In *Ryan* the Court held that a shipowner found liable to a longshoreman in a third-party claim could assert its own claim for indemnification from the injured worker's employer, the stevedore, even absent an express agreement of indemnity. The Court stated that in a contract to perform stevedoring operations, the stevedoring company impliedly agreed with the shipowner both to perform those services in a workman-like way and to indem-

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9. 79 C.J.S. *Seamen* § 192 (1952) states:

> [T]he doctrine of unseaworthiness is a species of liability without fault not limited by conceptions of negligence, and it is not contractual in character. Accordingly, such liability does not depend on the exercise of reasonable care and may be imposed on the shipowner, in the case of unseaworthiness, irrespective of negligence or knowledge of condition of the vessel prior to her sailing. . . .

10. During the following years, suits against shipowners burgeoned as the range of items embraced by the concept of unseaworthy ships expanded to include even injuries sustained by longshoremen on dry land, *Thompson v. Calmar S.S. Corp.*, 331 F.2d 657 (3d Cir. 1964), and assaults by seamen, *Boudoin v. Lykes Bros. S.S. Co.*, 348 U.S. 336 (1955).

nify the shipowner for any liabilities he might incur as a result of the stevedoring company's failure to live up to that promise. *Ryan* thus exposed stevedores to a potentially substantial liability, greater than before, should an injured longshoreman elect to file a strict liability third-party claim against a shipowner rather than accept compensation "under an [11] award."[11] Of course, the consequences of *Ryan* did not pass unnoticed by the stevedores. Although they could do nothing if an injured worker chose not to accept an award, the stevedores could reduce their chances of liability by forcing all injured workers who accepted compensation to do so under an award. They realized that it was in their interest to resist all payments until an award was made because, at that point, pursuant to § 933(b), all rights to sue third parties would immediately vest in them. The stevedore could then take no action on the employee's personal injury claim and protect itself from any costly suits for indemnification.

As a result of the stevedores' resistance to provide any payments without an award, the injured worker usually took "compensation [under an award] for the simple reason that his expenses must be met immediately, not

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11. The *Ryan*-type of liability, together with the dozens of cases stemming from its precedent, was abolished by Congress in 1972. Compensation Act of 1972, Pub. L. No. 92-576, § 15 (f)-(h), 86 Stat. 1262 (1972). Abolished were both the shipowner's absolute liability for unseaworthiness and the shipowner's right to recover from the employer-stevedore. At the same time Congress substantially increased both the maximum and minimum compensation payments for injured workers. "The elimination of the shipowner's cause of action against the stevedore was intended to reduce litigation, immunize stevedores and their insurers from liability in third-party actions, and assure conservation of stevedore resources for compensation awards to longshoremen." *Bloomer v. Liberty Mutual Ins. Co.*, 445 U.S. 74, 84 (1980). However, the shipowner remained liable for injuries sustained by the longshoremen which were due to the shipowner's negligence. *See Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979). For further discussion of the *Ryan* doctrine *see* 2A LARSON, WORKMEN'S COMPENSATION LAW § 77.60 (1982).

months or years after when he has won his lawsuit." [12] S. REP. No. 428, 86th Cong., 1st Sess., 2 (1959). *See Bloomer v. Liberty Mutual Ins. Co.*, 445 U.S. 74, 80 (1980). Such circumstances were felt by Congress to "wor[k] a hardship on an employee by in effect forcing him to take compensation under the act because of the risks involved in pursuing a lawsuit against a third party." *Id.* Consequently, Congress again amended § 933(b) by postponing the assignment of the worker's right to sue a third party by operation of law until six months after the acceptance of compensation.[12] It is that amended section which is in issue in the instant case. "The effect of the six-month provision, of course, was to give the [worker] an unqualified right to bring a third-party action during the six-month period. If his financial circumstances made it imperative that he accept a prompt settlement of his compensation claim, he could do so without forfeiting his right to seek a more liberal recovery from a responsible third party. Moreover, by bringing his own action, the [worker] would avoid the risk that his employers' potential conflict of interest—or possible erroneous evaluation of the merits of the claim—might result in its abandonment." *Rodriquez, supra* at 611. There can be no question that Congress enacted the 1959 amendment with the clear intention of preserving the injured worker's right to claim against third parties with or without an award of compensation. The amendment merely expanded that right to file third-party suits to include a six-month grace period after the award of compensation. It did nothing to eliminate the worker's right to file a claim after receiving compensation without an award. That right remained preserved by *American Stevedores v. Porello, supra.*

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12. Act of Aug. 18, 1959, Pub. L. No. 86-171, 73 Stat. 391. *See* S.REP. No. 428, 86th Cong., 1st Sess., *reprinted* in 1959 U.S. CODE CONG. & AD. NEWS, p. 2134.

[13] The crux of the analysis in this case focuses on the definition of the term "award" within the phrases compensation "under an award in a compensation order" and compensation "without an award." A particular term used in different sections of a statute must be assumed to have a consistent definition unless otherwise indicated or obvious from the fact of the statute or the context in which it appears. *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932); *Fortin v. Marshall*, 608 F.2d 525, 528 (1st Cir. 1979). Likewise "[s]tatutory provisions are to be construed not in isolation, but together with other related provisions." *United Mine Workers of America v. Andrus*, 189 U.S.App.D.C. 110, 114, 581 F.2d 888, 892 (1978). To define the term "award" too broadly, so as to construe compensation "under an award in a compensation order" to include virtually all payments, would be inconsistent with other sections of the LHWCA. Section 914(a) states:

> Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled thereto, *without an award*, except where liability to pay compensation is controverted by the employer. [Emphasis added.]

Section 913(a) similarly distinguishes compensation "without an award." It states: "If payment of compensation has been made *without an award* . . . a claim [for an award of compensation] may be filed within one year after the date of the last payment." (Emphasis added.) Once the claim is made and the necessary investigations and hearings are held, the deputy commissioner must "*by order*, reject the claim or make an award in respect of the claim." Section 919(c) (emphasis added). Under §§ 913(a), 914(a), and 919(c), payments made without an award are not synonymous with compensation paid under the terms of an award.

[14] The distinction is also drawn in §§ 914(e) and (f) where additional compensation is made payable for overdue installments. Section 914(e) states:

> If any installment of compensation payable *without an award* is not paid within fourteen days after it becomes due . . . there shall be added to such unpaid installment an amount equal to 10 per centum thereof . . . . [Emphasis added.]

By contrast, § 914(f) provides:

> If any compensation, payable *under the terms of an award*, is not paid within ten days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20 per centum thereof . . . . [Emphasis added.]

To hold that payments made without an award in § 933(b) are subsumed under the phrase "compensation under an award" would violate the rule that terms and phrases must be construed consistently throughout a statute.

Other jurisdictions are split in their interpretations of the term "award" within the two phrases of the statute. Appellees place their reliance on *Liberty Mutual Insurance Co. v. Ameta and Co.*, 564 F.2d 1097 (4th Cir. 1977). In that case the court held that various documents received by the proper government officers "constituted sufficient affirmative action and a determination by the deputy commissioner granting to [the employee] so as to constitute an 'award' of benefits in a compensation order under 33 U.S.C. § 933(b) without the entry of a formal award."[13]

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13. The documents filed in *Liberty Mutual* were

a) Form BEC-202—Employer's First Report of Accident or Occupational Illness; and

b) Form BEC-206—Payment of Compensation Without Award; and

(Continued on following page)

[15] *Id.* at 1103. The documents submitted in that case were virtually identical to those filed in the instant case.[14] The court stated:

> An award under a compensation order does not require formal entry of an award *per se*. Rather, the focus should properly be upon some act of ratification of compensation, whether formal or informal, and by the subsequent acceptance of compensation by the claimant. [*Id.* at 1102.]

[16] *See also Collins v. Norfolk Shipbuilding & Drydock Co.*, 522 F.Supp. 1211 (E.D.Va. 1981); *Larson v. Associated Container Transp. (Australia)*, 459 F.Supp. 561 (E.D.Va. 1978); *Francavilla v. Bank Line, Ltd.*, 470 F.Supp. 94 (S.D.N.Y. 1979). Interestingly, one of the cases to employ the *Liberty Mutual* rule was *Rodriguez v. Compass*

Footnote continued—

c) Form No. 6—Attending Physician's Report; and

d) Form BEC-208—Compensation Payment Stopped or Suspended. [*Liberty Mutual, supra* at 1101, n.10.]

In addition to compensation payments, the longshoreman in *Liberty Mutual* also obtained a voluntary settlement of $1,000 from the third-party shipowner whose alleged negligence caused his injury. The settlement agreement further provided an indemnity clause wherein the shipowner agreed to indemnify the longshoreman up to $1,000 for all claims or lawsuits brought by the insurance carrier to recover any compensation payments. Unable to recover any of its payments from the longshoreman, the insurance carrier filed suit against the shipowner. Finding that there was an award of compensation based on the filing of various documents, the court was able to enforce the insurance company's claims for reimbursement of compensation. 33 U.S.C. § 933(h).

14. The documents filed in the instant case were Form BEC-202 and Form BEC-206. Five weeks after Carey's injury the insurance carrier temporarily suspended payments to correct an error in its calculations of Carey's average weekly wage. However, the form suspending Carey's initial payment of $215.20 per week, Form BEC-208, and the form initiating his recalculated payment of $187.36 per week, Form BEC-202, were both filed with the deputy commissioner on the same day. The reason given on the form for suspending the compensation was to correct the error in the original amount.

Shipping Co., Ltd., 456 F.Supp. 1014 (S.D.N.Y. 1978), which was the lead case in *Rodriguez v. Compass Shipping Co., Ltd.*, 451 U.S. 596 (1981). The trial court in the instant case cited to the Supreme Court in *Rodriguez* as disposing of the issue presently under examination. *See supra* note 5. When *Rodriguez* was before the district court, the court held that the settlement agreement entered into and signed by all the parties before a claims examiner during an "informal conference" constituted sufficient affirmative action for a determination that there had been an award of compensation. Although the district court cited to *Liberty Mutual* when it issued its ruling, it expressly stated that it did not agree with the conclusion of *Liberty Mutual* that the event which occurred in that case constituted a statutory award. *Rodriguez, supra*, 456 F.Supp. at 1020 n.5.

In rejecting the holding in *Liberty Mutual*, the court in *Collier v. John Mendis, Inc.*, 526 F.Supp. 459, 460 (D.D.C. 1981) stated:

> *Liberty Mutual Insurance Co. v. Ameta and Co.*, [*supra*, is inconsistent] both with the language and policy of the Act. Indeed, it is not certain that the Fourth Circuit would have arrived at that result were it not for its policy, expressed in *Caldwell v. Ogden Sea Transport, Inc.*, 618 F.2d 1037 (4th Cir. 1980), of allowing the employee [17] to sue whenever the employer chooses not to sue.[15] Since the *Caldwell*

---

15. In *Caldwell, supra*, the Fourth Circuit expanded the injured worker's right of action in third-party suits set down in *Czaplicki, supra*, where an assignee-employer's conflict of interest with the third party reassigned to the injured worker any right to sue the third party. *See supra* at n.12. The court in *Caldwell* stated:

> The fundamental point in *Czaplicki* is that notwithstanding a statutory assignment of the longshoreman's right of action, that right of action may be revested in the longshoreman

(Continued on following page)

policy was overruled in *Rodriguez v. Compass Shipping Co.*, 451 U.S. 596, 101 S.Ct. 1945, 68 L.Ed.2d 472 (1981), [*see supra*] invoking the *Liberty Mutual* rule might have effects unforeseen by the Court that adopted it.

Other courts have similarly rejected the *Liberty Mutual* analysis. In *Dunbar v. Retla Steamship Co.*, 484 F.Supp. 1308, 1311 (E.D.Pa. 1980), the court held that "mere acceptance of compensation payments does not preclude an injured employee from thereafter electing to sue a third-party tort-feasor." *Quoting American Stevedores v. Porello, supra* at 456. In *Dunbar*, the defendant moved for summary judgment on the grounds that (1) a claim [18] had been filed with the Office of Worker's Compensation Programs, (2) the employer had submitted all the necessary forms (including BEC-202, BEC-206, BEC-208 and form No. 6), *see supra* notes 13 and 14, and (3) the employee had received compensation more than six months prior to bringing the third party action. The Court found that filing the claim was not an act that could be properly construed as an award under § 933(b) and that there had been no substantial involvement with the OWCP sufficient to view acceptance of compensation as a forfeiture of the employee's rights against third-party tort-feasors. The Court further stated:

> To allow an assignment of a claimant's entitlement to sue to be triggered by the mere acceptance

---

Footnote continued—

when it becomes manifest that the assignee, with knowledge of its exclusive right to control and prosecute the claim, nevertheless declines to do so for any reason. This surely accords with the equitable considerations that the longshoreman should not lose his substantive right simply by reason of disinclination of the statutory assignee to sue, and that a deliberate decision by the latter to forego the exclusive right to control prosecution of the claim must reflect a knowledgeable relinquishment of right. [*Id.* at 1046.]

> of benefits and the passage of time, at a point when the claimant is most in need of those benefits, would increase the likelihood that the assignment will be unwitting and unwilling, for both employer and employee—a result at odds with the purpose of the Act generally and this section in particular. [*Id.* at 1311.]

See also Fearson v. Johns-Manville Sales Corp., 525 F.Supp. 671 (D.D.C. 1981); *Theodore v. Moore McCormack Lines, Inc.*, 516 F.Supp. 25 (S.D.N.Y. 1981); *Sea Quest Marine, Inc. v. Cove Shipping, Inc.*, 474 F.Supp. 164 (W.D. Wash. 1979).

As in *Dunbar*, the facts in the instant case show no involvement by the deputy commissioner or the Office of Worker's Compensation Programs and no controversion by appellant Carey's employer. The appellants merely accepted compensation which was offered without benefit of an award and to which they were seemingly entitled. To [19] allow assignment of their claim based on those facts would surely violate the LHWCA's statutory purpose, and would be inconsistent with other provisions of the Act. Accordingly, the judgment of the Superior Court dismissing the complaint is reversed and the case is remanded with instructions to reinstate the complaint and for further proceedings.

Reversed and remanded
for further proceedings.

APPENDIX B

Decision of the United States District Court of Florida in MacKenzie et al. v. Caldwell Shipping Co. et al.

Case No. 82-218-Civ-J-M

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

GEORGE MACKENZIE,
Plaintiff,
and
I.T.O. CORPORATION OF BALTIMORE,
a Maryland corporation,
Intervening Plaintiff,
vs.
CALDWELL SHIPPING CO., Individually and As a Wholly-Owned Subsidiary or Division of Strachan Shipping Company, a Georgia Corporation,
and
STRACHAN SHIPPING COMPANY, a Georgia Corporation,
Defendants.

ORDER

(Filed March 9, 1983)

This cause is before the Court on defendants Caldwell Shipping Company and Strachan Shipping Company's Mo-

tion for Summary Judgment. The Court has considered the legal memoranda filed by the parties and has heard oral argument on the motion.

Defendants contend that the cause of action was not instituted within the six-month period of section 933(b) of the Longshoreman's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1976). Defendants rely on two decisions by the United States Court of Appeals for the Fourth Circuit. These decisions hold that the six-month period during which the longshoremen must file suit is triggered by the filing of certain forms and the acceptance by the employee of voluntary compensation payments from the employer. *See Simmons v. Sea-Land Services, Inc.*, 676 F.2d 106 (4th Cir.), *cert. denied*, 103 S. Ct. 242, *petition for reh'g filed*, (U.S. Nov. 5, 1982) (No. 82-56); *Liberty Mutual Insurance Co. v. Ameta & Co.*, 564 F.2d 1097 (4th Cir. 1977). Plaintiff Mackenzie and his employer, intervening plaintiff, I.T.O. Corporation of Baltimore, oppose the motion for summary judgment, contending that the six-month period is not triggered until the entry of a formal award by the Deputy Commissioner. *See Duris v. Erato Shipping, Inc.*, 684 F.2d 353 (6th Cir.) (mere acceptance of compensation does not constitute formal award), *cert. granted sub nom. Pallas Shipping Agency, Ltd. v. Duris*, 103 S. Ct. 371-72 (1982); *Verderame v. Torm Lines*, 670 F.2d 5, 7 (2d Cir. 1982); *Kirsch v. Bangladesh Shipping Corp.*, 544 F. Supp. 83, 85 (E.D. Pa. 1982) (acceptance of compensation by longshoreman and filing of accident reports by employer does not trigger section 933(b) assignment provision); *Howell v. Ocean Transportation Co.*, No. 81-0654-H (S.D. Ala. Nov. 2, 1982) (mere acceptance of compensation does not constitute formal award).

This Court is of the opinion that the overwhelming weight of authority supports plaintiff's position. Because no formal award has been entered in this case, the six-month period of section 933(b) has not been triggered. Consequently, no assignment of the cause of action against defendants has occurred, and defendant's motion must therefore be denied. Accordingly, it is

ADJUDGED:

That defendants' Motion for Summary Judgment is denied.

ORDERED at Jacksonville, Florida, this 8th day of March, 1983.

/s/ HOWELL W. MELTON
United States District Judge

APPENDIX C

Affidavit of Thomas C. Hunter

AFFIDAVIT

STATE OF ILLINOIS:

SS

COUNTY OF COOK:

I, Thomas C. Hunter, Assistant Deputy Commissioner for the 10th Compensation District of the U.S. Department of Labor, Employment Standards Administration, Office of Worker's Compensation Program, hereby swear and affirm that the following facts are true:

1. That Joseph Duris is a claimant under the Longshoremen's and Harbor Worker's Compensation Act who timely filed a claim for Compensation under said Act for injuries sustained on May 19, 1975.

2. That the file pertaining to such claim has been in the possession and under the control of the Affiant hereunder through the authority of the Act and the Deputy Commissioner for the 10th Compensation District.

3. That on the 25th day of February, 1983, a Compensation Order Award of Compensation was issued and filed by the Deputy Commissioner for the 10th Compensation District, a copy of which is attached hereto and marked as Exhibit A and is a true and accurate copy of said Award in the Compensation Order.

4. That I have personally examined the complete file regarding the claim of Joseph Duris under the aforementioned Act and hereby state that the Compensation Order, Award of Compensation attached hereto is the

only such Compensation paid in said case under an award in a Compensation Order filed by the Deputy Commissioner.

/s/ THOMAS C. HUNTER
Thomas C. Hunter

Sworn to and subscribed before me this 30th day of March, 1983, by Thomas C. Hunter, personally known to me.

/s/ MARY ANN RALIDAK
Notary Public

[Seal]

Compensation Order Award of Compensation
Case No. 9-4012
Act: Longshore

U. S. Department of Labor
Employment Standards Administration
Office of Workers' Compensation Programs

Joseph E. Duris,
Claimant

v.

Toledo Overseas, Terminals,
Employer

Underwriters Adjustment Company,
Insurance Carrier

Pursuant to agreement and stipulation by and between the interested parties, and such further investigation in the above entitled claim having been made as is considered necessary, and no hearing having been ap-

plied for by any party in interest, or considered necessary by the Deputy Commissioner, the Deputy Commissioner makes the following:

FINDINGS OF FACT

1. That on May 19, 1975, the claimant above-named was in the employ of the employer above-named at Toledo Terminals in the 10th Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended and extended; that the liability of the employer for compensation under the said Act was insured by the Underwriters Adjustment Company.

2. That on said day the claimant, while performing service as a longshoreman for the employer, sustained an injury to the right leg, right hand and left foot and such injury comes within the purview of the above Act.

3. The requirements of notice of the injury to the employer have been met.

4. The employer furnished the claimant with medical treatment, etc. in accordance with the provisions of Section 7 of the said Act.

5. The average weekly wage of the claimant at the time of injury was $99.80.

6. As a result of the injury, the claimant was wholly disabled from May 19, 1975 to April 21, 1977, inclusive, for which he is entitled to compensation for temporary total disability for 98 4/7 weeks, at $74.57 per week, in the amount of $7,516.65.

7a. As a further result of the injury, the claimant sustained a permanent partial disability equivalent to 72.5 percent loss of use of the right leg, for which he is en-

titled to compensation for 209 weeks (72.5 percent of 288 weeks) at $74.57 per week, in the amount of $15,585.13.

7b. As a further result of the injury, the claimant sustained a permanent partial disability equivalent to 58 percent loss of use of the left foot, for which he is entitled to compensation for 119 weeks (58 percent of 205 weeks) at $74.57 per week, in the amount of $8,873.83.

7c. As a further result of the injury, the claimant sustained a permanent partial disability equivalent to 36 percent loss of use of the right hand, for which he is entitled to compensation for 88 weeks (36 percent of 244 weeks) at $74.57 per week, in the amount of $6,562.16.

8. Accrued compensation for temporary total, temporary partial, and permanent partial disability amounts to $38,537.77. The employer and the insurance carrier have paid $7,516.65 to the claimant as compensation.

Upon the foregoing findings of fact, the Deputy Commissioner makes the following

AWARD

1. The employer, the Toledo Overseas Terminal, and the insurance carrier, the Underwriters Adjustment Company, shall pay compensation to the claimant as follows: For ,temporary total disability from May 19, 1975 to April 21, 1977, 98 4/7 weeks at $74.57 per week; for permanent partial disability from May 1, 1977 to April 30, 1987, inclusive 514 4/7 weeks at $74.57 per week, a total of $38,537.77.

2. The employer and the insurance carrier having paid $7,516.65 to the claimant as compensation shall pay

forthwith $31,021.12 whereupon the file of Joseph Duris will be CLOSED, subject to the limitations of the Act or until further order of the Deputy Commissioner.

3. The employer and the insurance carrier shall continue to provide medical services to the claimant in accordance with the provisions of Section 7(a) of the Act.

4. A fee of $5,036.51, to include medical expenses is approved in favor of William Culbert, attorney at law, for services rendered on behalf of the claimant, such sum to be a lien upon and be paid from this award.

Given under my hand at Chicago Illinois, this 25th day of February, 1983

/s/ D. G. TUOHY
Donna G. Tuohy
Acting Deputy Commissioner
10th Compensation District

CERTIFICATE OF FILING AND SERVICE

I certify that on February 25, 1983 the foregoing Compensation Order was filed in the Office of the Deputy Commissioner, 10th Compensation District and a copy thereof was mailed on said date by certified mail to the parties and their representatives at the last known address of each as follows:

Joseph Duris, c/o Attorney Culbert, 609 Security Building, Toledo, OH 43604
Claimant

William M. Culbert, 609 Security Building, Toledo, OH 43604

Underwriters Adjustment Company, 3450 W. Central Avenue, Toledo, OH 43604

Insurance Carrier or Employer (if self-insured) A copy was also mailed by regular mail to the following:

Director, Office of Workers' Compensation Programs, (LHWCA), U. S. Department of Labor, Washington, D.C. 20211

/s/ D. G. TUOHY
Donna G. Tuohy
Deputy Commissioner
10th Compensation District
U.S. Department of Labor
EMPLOYMENT STANDARDS ADMINISTRATION
Office of Workers' Compensation Programs

If any compensation, payable under the terms of an award, is not paid within ten days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20 percent thereof. The additional amount shall be paid at the same time as, but in addition to, such compensation.

The date compensation is due is the date the Deputy Commissioner files the decision or order in his office.

Office-Supreme Court, U.S.
FILED
APR 18 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-502

In the Supreme Court of the United States

October Term, 1982

PALLAS SHIPPING AGENCY, LTD.,
Petitioner,

vs.

JOSEPH DURIS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONER

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No. 82-502

In the Supreme Court of the United States

October Term, 1982

PALLAS SHIPPING AGENCY, LTD.,
Petitioner,

vs.

JOSEPH DURIS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONER

PRELIMINARY STATEMENT

After the filing of the Brief of Petitioner, copies of various documents relating to Respondent's claim for compensation and filed in the Office of Workers Compensation Programs, Department of Labor, were received from the Department of Labor. These documents show that by letter dated June 13, 1975, to the OWCP, Joseph Duris appointed William Culbert as his attorney for the compensation claim (Exhibit 1).[1] Thereafter, a formal com-

1. Exhibits 1-7 were obtained by Petitioner from the Department of Labor (OWCP) in March 1983. Although requested, they were not made available to Petitioner prior to that time. Accordingly, these documents have been included as an appendix to this Brief in order to provide the Court with a complete view of the compensation proceedings.

pensation claim dated November 13, 1975, but marked received by the OWCP on February 11, 1976, was filed (Exhibit 2). On the same day, a notice was sent by the OWCP to the employer that a claim had been filed (Exhibit 3). On August 19, 1976, the deputy commissioner held a conference and by memo dated September 2, 1976, recited the discussion at the conference, recommended the continued payment of compensation and requested certain medical reports (Exhibit 4). This memorandum was sent to the claimant, his attorney and the compensation insurer. The compensation benefits were paid and accepted pursuant to this memorandum through April 21, 1977 (Exhibit A annexed to Brief of Respondent). The significance of these items to the question presented here is discussed in Point V.

Three additional conferences were held in February 1977, September 1979 and October 1980 (Exhibits 5, 6 and 7). The memoranda filed as a result of these conferences indicate that plaintiff was returning to work and that plaintiff wished to hold the claim in abeyance pending a third-party lawsuit. An agreement was eventually reached on permanent partial disability benefits.

ARGUMENT

I. THE PRIMARY ISSUE IN THIS LITIGATION IS WHETHER THE "AWARD IN A COMPENSATION ORDER" PROVISION IN 33 U.S.C. § 933(b) IS SATISFIED BY AN "ACT OF RATIFICATION OF COMPENSATION AND THE SUBSEQUENT ACCEPTANCE OF COMPENSATION" BY THIS RESPONDENT.

(a) Contrary to the Contentions of the Respondent and the Briefs Amici Curiae, Filed Herein on His Behalf, the Procedural Requirements for Assignment Under 33 U.S.C. § 933(b) Were Satisfied in This Case.

The Court below held that the "mere receipt of compensation benefits under the Act does not trigger the assignment provision of section 33(b)" (Joint App. 46). In urging affirmance of that ruling, the Respondent not only sets forth in his "Questions Presented" but in the argument that follows his contention that "mere receipt of compensation does not trigger the assignment provisions of section 33(b)" (Resp. Br. 1, 2). The same contention appears in the Amici Curiae brief filed on behalf of the Association of Trial Lawyers of America (Br. 6).

It should be clear from Petitioner's Brief that it is unnecessary to decide in this case whether the acceptance of compensation benefits alone triggers the six-month provision of Section 33(b) of the Act. It is stated there and reaffirmed here that compensation for temporary total disability was paid and accepted from May 20, 1975 through April 21, 1977. The payment and acceptance was reported to the Department of Labor by the filing of the LS-206 (Joint App. p. 46) dated June 2, 1975 and the termination

was reported by the L.S. 208 dated April 29, 1977 (Exhibit A to Brief of Respondent). The six-month period was triggered if not by the initial payment of compensation, then by the filing of claim under Section 19 (33 U.S.C.A. § 919) of the Act, or by the Deputy Commissioner's approval in writing on September 2, 1975, of the payment of compensation, or at the latest by the filing of the LS-208 showing the termination of temporary total disability benefits. All of these actions occurred three years or more before the commencement of this lawsuit.

As recently as December 13, 1982, the United States District Court for the Southern District of Texas considered the award question and ruled that recognition by the employer's insurance carrier of the longshoreman's right to compensation, the carrier's filing of the notice of payment of compensation and the longshoreman's acceptance of the first compensation payment constituted an "award in a compensation order" for the purpose of Section 33(b) of the Longshoremen's and Harbor Workers' Compensation Act, *Williamson v. M/V Sandra Wesch*, 552 F. Supp. 852 (S.D. Tex. 1982). In granting the defendant's motion to dismiss, the Court declined to follow the Sixth Circuit's *Duris* opinion. *Id.* at 854. The Court adopted the Fourth Circuit rule and after reviewing the decisions stated:

> "These courts have articulated the policy underlying the *Simmons* rule contending that it will advance the welfare of longshoremen by:
>
> 1. fostering the prompt payment of benefits by the employer or its insurance carrier since an employer will not have to perfunctorily controvert each claim filed to assure an assignment;
>
> 2. allowing the longshoreman six months after he first receives compensation to assess his options; and

3. eliminating the delay and expense of litigation that would occur if every longshoreman's claim was controverted."

Finally, the Court stated (p. 855):

> *"This court agrees with the above stated rationale and is convinced that the rule it adopts today will promote the interest of both the longshoreman and his employer while furthering the purposes of the LHWCA."*

This case and others from *Toomey v. Waterman S.S.*, 123 F.2d 718 (2d Cir. 1941), through *Simmons v. Sea-Land Services*, 676 F.2d 106 (4th Cir. 1982), *cert. denied*, 103 S. Ct. 242 (1982), recognized the necessity to interpret Section 33 in light of the realities of administrative practice and in furtherance of the Congressional policy.

II. THE RESPONDENT CONCEDES THAT THE FACTS IN LIBERTY MUTUAL INSURANCE CO. V. AMETA & CO., 564 F.2d 1097 (4TH CIR. 1977), AND IN THE CASE AT BAR ARE STRIKINGLY SIMILAR AND THAT THE COURT IN THAT CASE WAS CONFRONTED BY AN ISSUE IDENTICAL WITH THE ONE RAISED HEREIN (RESP. BR. 20).

It is obvious, in *Ameta, supra*, that the issue as to whether every claim must be controverted by the employer in order to protect its lien rights was not before the Court nor necessary to its decision and that its statements in that connection were, as conceded by the Respondent, purely *dicta* (Resp. Br. 22). The Court's ruling was not based upon "an inaccurate and misleading fact" (Resp. Br. 22) but upon its interpretation of the meaning of the phrase "an award in a compensation order." It remains a persuasive authority for the fundamental pro-

position that the *formal* entry of an award is not necessary to trigger the statutory assignment of the rights of the longshoreman.

The Respondent asserts that *Larson v. Associated Containers Transportation (Australia) Ltd.*, 459 F. Supp. 561 (E.D. Va. 1978), and *Simmons v. Sea-Land Services*, 676 F.2d 106 (4th Cir. 1982), are not persuasive because they are founded upon "inaccurate assumptions" and "do not follow the legislative purpose or interpret the Act as a whole." (Resp. Br. 20, 21).

The Respondent has failed to set forth the "inaccurate assumptions " upon which *Larson* and *Simmons* are allegedly based and it should be pointed out that in *Ameta, Larson* and *Simmons* the principal issue was not an interpretation of LHWCA as a whole, but an interpretation of the phrase "an award in a compensation order" as found in Section 33(b) of that statute. That, also, is the primary issue in this case before this Court.

We respectfully suggest that this issue is not only before this Court for definitive determination but a guide should be given to the lower federal courts concerning the commencement of the six-month period during which the longshoreman must file suit against the third-party tortfeasor. The decisions in the courts below on this issue have not been uniform. Some have chosen the first receipt of compensation as the starting date. Others have specified that the time begins to run when the payments have been terminated. In the instant case the third-party suit was filed well beyond the six-month period as it relates either to the commencement or termination of payments. It is our belief, however, that in order to give the longshoreman as much time as possible to exercise his option one possibility that could be considered is that the termination of payments (as reflected by LS-

208) should be selected as the starting point. The interests of the longshoreman in that connection has been the basis of the amendments of the Act which took place in 1938 and 1959.

On February 25, 1983 (subsequent to the filing of all briefs in this litigation), a Compensation Order Award of Compensation was made in this case by the Acting Deputy Commissioner. A copy of the Order and Award, together with the Certificate of Filing and Service, are attached to the Respondent's Supplemental Brief as Appendix C. Under the Award the Respondent herein is to receive a total of $38,537.77 compensation benefits, less the $7,516.65 already paid, leaving a net amount of $31,021.12 to be paid.

It should be pointed out that the Award also provides for a fee of $5,036.51 to William Culbert, attorney at law, "for services rendered on behalf of the claimant, such sum to be a lien upon and to be paid from this award."

The award to Mr. Culbert should remove any doubt as to whether the Respondent was receiving expert legal assistance during the period when he was required to exercise his option to file the third-party suit.

Even if the Respondent had not, as he did, secured the services of a lawyer familiar with the practice and procedure under the Longshoremen's and Harbor Workers' Compensation Act, that Act provides for the furnishing, upon request, of assistance and information relating to the Act's coverage and compensation. Section 939(c)(1) of the Act provides as follows:

> "The Secretary shall, upon request, provide persons covered by this Act with information and assistance relating to the Act's coverage and compensation and the procedures for obtaining such compensation

including acceptance in processing a claim. *The Secretary may, upon request, provide persons covered by this Act with legal assistance in processing a claim.* * * *" (1972 Amendments) (Emphasis supplied).

To suggest, in light of the above, that the Respondent's interests have not been protected throughout this litigation and that he was "forced to proceed in the dark" is to refuse to concede the obvious.

Thus, whether the rationale of the Fourth Circuit decisions is accepted, or the somewhat more restricted reasoning of the Second Circuit decisions is held to be controlling, the events in the instant case amount to an "award in a compensation order."

III. THE CONFLICT OF INTEREST ISSUE WAS NOT IN THIS CASE UNTIL BROUGHT INTO IT BY THE COURT BELOW. IT HAD A CONTROLLING INFLUENCE ON THAT COURT'S DECISION.

We agree with the Respondent that the conflict of interest was not initially in this case (Resp. Br. 30, 31). The relationship between the Respondent and his employer was, as stated in Petitioner's Brief at page 36, the normal, classical relationship between those parties. To urge, however, as does the Respondent, that the well known disinclination of the employer to sue his customer, the shipowner, played no part in the decision of the Court below is to disregard the plain meaning of the language used by the Court (Resp. Br. 33).

The Court below began its discussion of the conflict of interest issue by alluding to *"the very real threat of conflicting interests between employer and employee"* (Joint App. 45). Further, on the same page, and during its dis-

cussion of the relationship between the parties, the Court states that the dependence of the employer-assignee on the shipowner or charterer for future business reduces the probability that it will operate to protect the rights of the injured employee. Finally, on that point it states (Joint App. 45):

> "This conflict of interest problems makes us hesitate to countenance an interpretation of the Act which would expand the assignment provisions of section 33."

In light of the above, to assert that the conflict of interest issue was not part of the decision below is to fail to recognize the plain meaning of the words used by the Court.

The Court below not only hesitated to "expand the assignment provisions of section 33" of the Act but adopted the restrictive interpretation because of its misconception of the conflict of interest picture and its feeling that an expanded interpretation would leave the Respondent's interests unprotected.

IV. THE EXISTENCE OR NONEXISTENCE OF A NONSTATUTORY ACTION BY THE EMPLOYER-ASSIGNEE AGAINST A THIRD-PARTY TORTFEASOR IS NOT AN ISSUE IN THIS LITIGATION. THE DECISION OF THIS COURT IN THE BURNSIDE CASE IS NOT ONLY IRRELEVANT BUT THE VIABILITY OF THAT DECISION, IN LIGHT OF 1972 AMENDMENTS, IS QUESTIONABLE.

In two of the three amici curiae briefs which have been filed herein in support of the Respondent the argument is advanced that the existence of a cause of action, under the General Maritime Law, by the employer-assignee against

a negligent tortfeasor, as set forth in the case of *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 394 U.S. 404 (1969), renders unnecessary the statutory assignment of the third-party claim (Br. Association of Trial Lawyers of America, 32, 45 and Br. United States of America, 3, 19).

Before discussing this matter any further, it should be pointed out that the Brief of Respondent contains no reference to the *Burnside* decision nor to the existence or nonexistence of a cause of action under the General Maritime Law on behalf of the employer/assignee and against the alleged third-party tortfeasor. The failure of the Respondent, as one of the central figures in this litigation, to rely upon *Burnside* and the principle for which it stands, is an implicit recognition of the nonrelevancy of that principle in this case. We again repeat that the controlling issue before this Court is whether the assignment provisions of Section 33(b) have or have not been satisfied. The existence or nonexistence of a nonstatutory cause of action has no bearing upon that issue.

The question of the effect of the 1972 Amendments of LHWCA on *Burnside* and erroneous reliance upon that decision by the Court below is discussed in detail in the brief filed on behalf of the Petitioner by thirteen American flag steamship companies (Br. 17, 18, 19). No useful purpose would be served by repeating those arguments here. Suffice it to say that they establish, in the absence of definitive authority, that the 1972 Amendments have rendered the viability of *Burnside* highly questionable.

The pertinent provisions of 33 U.S.C.A. § 905(b) as amended in 1972 are as follows:

> "(b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to re-

cover damages by reason thereof, *may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void.* * * * *The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.*" (Emphasis supplied.)

The subsection 33 U.S.C.A. § 905 bears the legend, "Exclusiveness of liability" which emphasizes the nature of the remedy which it affords.

In considering the effect of the 1972 Amendments, this Court in *Rodriguez v. Compass Shipping Co., Ltd.*, 101 S. Ct. 1945, at 1957, stated:

"Three of the 1972 Amendments are pertinent. *First, the level of benefits was substantially increased,* thereby increasing the likelihood that the statutory compensation recoverable without proof of fault would be adequate. *Second, the shipowner's right to seek indemnity from the stevedore under Ryan Stevedoring was eliminated, thereby removing a category of litigation from the courts, placing more definite limits on the stevedore's insurance costs, and removing a potential source of conflict between the interests of employers and employees. Third, the shipowner's nearly absolute liability for unseaworthiness was eliminated, thereby further narrowing the area of potential litigation and increasing the relative importance of statutory awards as the favored method of compensation.* * * *" (Emphasis supplied.)

Federal maritime law may have recognized a direct tort action against the shipowner to recover the amount of compensation benefits occasioned by the shipowner's negligence, as set forth in *Burnside, supra,* but Congress, in the 1972 Amendments, seems to have effectively eliminated that remedy.

The United States Court of Appeals for the Second Circuit, an experienced admiralty tribunal, in discussing *Burnside* in light of the 1972 Amendments, did not decide the exclusivity features of 33 U.S.C. § 905(b) but gave a clear indication of its views on that matter. It said in *Landon v. Lief Hoegh & Co.,* 521 F.2d 756 at 761 (2d Cir. 1975), *cert. denied,* 423 U.S. 1053 (1976):

> "It may be, too, that a *Burnside* type of action no longer exists in light of the provision that 'the remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.' 33 U.S.C. § 905(b). But that is a question we need not decide."

Under the double attack of irrelevancy and the effect of the 1972 Amendments, the viability of *Burnside* in the instant case is, at best, questionable.

V. RESPONDENT AND ITS AMICI, INCLUDING THE UNITED STATES, FAIL TO UNDERSTAND THE IMPACT OF § 919(c) OF THE ACT AND HOW IT AFFECTS THE OVERALL SCHEME OF ADMINISTRATION.

All parties to this litigation would agree that one of the primary purposes of the Act is to get compensation into the hands of the longshoreman at the earliest possible time following his injury. Indeed § 914(a) so states. An examination of the Act as a whole also clearly reveals

the intention of Congress to set up a compensation procedure which will insure promptness in the handling of claims and in decisions by administrative officials. Under Section 939(a), the Secretary of Labor is directed to administer the Act and authorized to promulgate rules and regulations as may be necessary (33 U.S.C.A. § 939(a)).

The brief of the United States (Br. 4) discusses § 919(c)[2] but only with respect to the first portion of that statute which, they allege, requires contested claims, if carried to formal hearings, to result in the issuance of formal compensation orders. So, too, the Unions, at pp. 22-23 of their Brief Amicus, read Section 919(c) as if it is limited to contested claims requiring a hearing. Respondent refers to the statute in a general manner (Resp. Br. 16), also suggesting that it is limited to contested claims. Both Respondent and the United States do, however, make the point that the employer could have obtained an award by controverting the claim (Resp. Br. 19) or by requesting it under the regulations (U.S. Br. 18).[3]

Petitioner suggests that the last sentence of § 919(c) must be considered not only with respect to its other

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2. § 919(a), (b) and (c) reprinted in Appendix pp. A1-A2.

3. The citation to regulations by the United States is incorrect. The regulations governing Duris's claim filed in 1975 or 1976 (Ex. 1 and 2) are found at 38 F. Reg. 26860 (Sept. 26, 1973). The regulations referred to by the United States did not take effect until September 1977. 42 F. Reg. 45330 (Sept. 9, 1977). Contrary to the suggestion of the United States at page 4, note 3, of its brief, 20 C.F.R. 702.312 (1976) made the claims examiner the designee of the deputy commissioner for all purposes, *Rodriguez v. Compass Shipping Co., Ltd.*, 617 F.2d 955 (2d Cir. 1980), *aff'd*, 451 U.S. 596 (1981) including the issuance of compensation orders. So, too, 20 C.F.R. 702.315 (1976) directed that upon reaching agreement a formal compensation order *shall* be prepared. Requests for compensation orders are not provided for in the regulations, apparently because the statute itself commands issuance of the order. The amended regulations cited by the United States and other Amici do not change the substantive rights of the parties. *Ambrosino v. Transoceanic S.S. Co., Ltd.*, 675 F.2d 470 (2d Cir. 1982).

subsections but other sections of the Act as well. The impact of this statute was ably discussed by shipowner's Amici (Br. 12-17). We wish to elaborate on that discussion as it pertains to the Duris case, Respondent's contentions and the overall scheme of the Act.

Mr. Duris was injured on May 19, 1975 (Resp. Br. 37). By virtue of § 914(b), the first installment of compensation was required to be paid 14 days after the injury and was, in fact, so paid (Resp. Br. 37). Thereafter, in accordance with § 914(c), the employer's insurance carrier filed Form LS-206 on June 2, 1975 (Joint App. 48).

In addition to the report forms which the employer is required to file with the Department of Labor, § 913(a) and § 919 contemplate the filing of a "claim" by the claimant "at any time after the first seven days of disability following an injury, or at any time after death" (§ 919(a)). The claim may be made either by formal document, Form LS-203 (Exh. 2), or informally by letter (Exh. 1). In the Duris case both an informal[4] and a formal claim were filed with the Deputy Commissioner. The informal claim letter is dated June 13, 1975, and the LS-203 November 13, 1975.[5]

Within 10 days after the claim is filed the Deputy Commissioner, pursuant to § 919(b), is required to notify the employer that a claim has been filed. Such Notice

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4. We are advised by the Department of Labor's Office in Chicago that this form of claim is known as a "de facto" claim inasmuch as the official form was not used initially. As to the propriety of this type of informal claim, see *Employers Liability Assurance Corp. Ltd. v. P. J. Donovan, Dep. Comm.*, 279 F.2d 76 (5th Cir. 1960) and *Atlantic & Gulf Stevedores, Inc. v. P. J. Donovan, Dep. Comm.*, 279 F.2d 75 (5th Cir. 1960).

5. This form is time-stamped by the Department of Labor on February 11, 1976, which is no doubt the correct date of receipt by the Department of Labor for reasons which will appear with regard to the Department's forwarding of the "Notice to Employer," *infra*.

(Exh. 3) was given to the employer by the Department of Labor in the Duris matter on February 11, 1976, the same date that the formal claim, LS-203, was recorded as being received.

Section 919(c) of the Act then requires the Deputy Commissioner to conduct, "or cause to be made," such investigation as he considers necessary with respect to every claim and, upon *application*, to order a hearing. After stating the notice aspects with respect to a hearing, this subsection then proceeds:

> "* * * If *no* hearing is *ordered* within 20 days after notice is given as provided in subdivision (b), the Deputy Commissioner *shall* by *order* reject the claim or make an *award* in respect of the claim." (Emphasis supplied.)

By virtue of § 914(d), and as stated in the Department's Notice to the Employer (Exh. 3) specified in § 919(b), the employer has 14 days in which to controvert the claim. If the claim is not controverted, as was the case in Duris, then the Deputy Commissioner was required by the aforementioned quote from § 919(c) to order an award within 20 days (30 days if one considers the 10 days regarding Notice to the Employer), or after the expiration of the time in which the claim could be controverted.

It therefore becomes evident and in line with the Act's expeditious and informal handling of claims that in each and every case where payments are made voluntarily (and they may well continue to be so paid) they must, absent an immediate contravention at the inception of the case, start "without an award." Following acceptance of the compensation by the claimant, and the filing of his formal or informal "claim," investigation by the Deputy Commissioner and notice to the employer, an award with

respect to the compensation *must* follow and absent contravention must follow within 20 days of the Notice to Employer (Exh. 3). The required order (Exh. 4)[6] was made in this case without the need for drawing forms of compensation orders by virtue of 20 C.F.R. 702.231, .311 and .315 (1976) promulgated by the Secretary under his § 939 authority to administer the Act. These regulations required,

> "Unless the employer controverts his liability to pay compensation under the Act, he shall pay periodically, promptly and directly to the person entitled thereto the benefits prescribed by the Act." (20 C.F.R. 702.231 (1975-76).)

The Deputy Commissioner was in turn directed to resolve any disputes by telephone or other expeditious means and the employer was required to make immediate payment upon becoming aware of the agreement, and without regard to the receipt of the formal compensation order. 20 C.F.R. 702.311, 315(a) (1975-76). Clearly, the critical event is agreement and the formal compensation order is nothing more than formality.

In addition, the Deputy Commissioner on August 19, 1976, convened a conference and issued a memorandum order (Exh. 4), copy of which was forwarded to both Mr. Duris and his attorney, recommending the continuance of the compensation payments. It is to be noted that a third-party action was contemplated and apparently discussed. Although payments of compensation to Duris continued to be made voluntarily by the employer's carrier, such payments from and after August 19, 1976, were now being made pursuant to an award in a compensation order is-

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6. See *Barulec v. Skou*, 471 F. Supp. 358 (S.D.N.Y. 1979) at p. 360, *aff'd*, 622 F.2d 572 (2d Cir. 1980), *aff'd*, 451 U.S. 596 (1981), and cases cited therein.

sued by the Deputy Commissioner, thus triggering the six-month assignment provision of § 933(b). At this time Mr. Duris was fully aware that he was receiving temporary total disability payments of a fixed amount which would continue until he was able to return to work. He also knew from the provisions of the Act that if, as a result of the injury, he sustained any permanent partial or total disability he would receive additional compensation based on the provisions of § 908.

After one additional conference held on February 17, 1977 (Exh. 5), Duris returned to work in April 1977. On April 29, 1977, the employer's carrier filed LS-208 with the Department of Labor (copy to Duris) (Ex. A and B - Resp. Br. 37, 38), indicating the last payment of temporary total disability compensation had been made on April 21, 1977, and that "Compensation Was Stopped Or Suspended."

The handling of this claim demonstrates both the informality necessary to accomplish the Act's contemplated purpose of expeditious claim resolution and the actual practice of the OWCP. Formal orders are simply unnecessary once agreement is reached between the parties, because of the regulations applicable to every case. Indeed, waiting for a formal final determination such as the one entered here in February 1983, eight years after the accident, effectively nullifies Sections 33(b) and 19(c), thereby violating the rights of interested parties. (See *Liberty Mutual Insurance Company v. United States,* 290 F.2d 257 (2d Cir. 1961).)

In summary, the Act contemplates that in every case claim, compensation will be paid voluntarily and without an award initially, but absent controversion, within 30 days of the claim, an appropriate order will issue and payment will be made thereunder. The regulations effecting this scheme must be interpreted to constitute the award, at

least for Section 33(b) purposes. To do otherwise would bar an assignment in the vast majority of cases (see lodgings accompanying shipowner's amicus brief) and render meaningless the language contained in Section 33(b). Indeed, this Court in *Czaplicki v. The Hoegh Silvercloud, et al.*, 351 U.S. 525 (1956), recognized the validity of a Section 919(c) award as effecting an assignment at 351 U.S. at page 528 (footnote 9).

Certainly more than one award can occur in any particular case (see, for example, § 907(d)) but in each and every case, except those involving no lost time, an award, be it formal or informal, is contemplated by the statute. We submit this is precisely what the *Simmons, supra,* Court had in mind when faced with reviewing some eight cases which included just about all levels of compensation payments and awards. It obviously felt compelled, consistent with the provisions of the Act, to define when an award in a compensation order was created. It proceeded to do so with the admonition that "the award must serve the dual purpose of protecting the welfare and rights of the longshoreman while not unduly delaying the employer's access to relief from negligent third parties." *Simmons, supra,* p. 109. We submit that the three events specified by the *Simmons* Court in defining an award not only fulfill the dual purpose which it sought to achieve, but the overall intent of the statutory provisions as well. In addition, this definition has the distinct advantage of setting a definite date in each case based upon the filing and acknowledgment of the required forms, copies of which are provided to the claimant. As noted earlier, however, for purposes of the instant case it is sufficient to note that not only the employer notices, but also the employee's "claim", a memorandum of the Deputy Commissioner and the LS-208 were all filed three years or more before the commencement of this lawsuit.

CONCLUSION

For the reasons set forth in the Petitioner's original brief and this reply brief, it is submitted that the decision of the United States Court of Appeals is erroneous; that it should be reversed and the complaint dismissed.

Respectfully submitted,

LUCIAN Y. RAY
WILLIAM D. CARLE III, *Counsel of Record*
DOUGLAS R. DENNY
RAY, ROBINSON, HANNINEN & CARLE
1050 Union Commerce Building
Cleveland, Ohio 44115
(216) 861-4533
Attorneys for Pallas Shipping Agency, Ltd., Petitioner

APPENDIX

33 USCA § 919 PROCEDURE IN RESPECT OF CLAIMS

Filing of claim

(a) Subject to the provisions of section 913 of this title a claim for compensation may be filed with the deputy commissioner in accordance with regulations prescribed by the Secretary at any time after the first seven days of disability following any injury, or at any time after death, and the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim.

Notice of claim

(b) Within ten days after such claim is filed the deputy commissioner, in accordance with regulations prescribed by the Secretary, shall notify the employer and any other person (other than the claimant), whom the deputy commissioner considers an interested party, that a claim has been filed. Such notice may be served personally upon the employer or other person, or sent to such employer or person by registered mail.

Investigations; order for hearing; notice; rejection or award

(c) The deputy commissioner shall make or cause to be made such investigations as he considers necessary in respect of the claim, and upon application of any interested party shall order a hearing thereon. If a hearing on such claim is ordered the deputy commissioner shall give the claimant and other interested parties at least ten days'

notice of such hearing, served personally upon the claimant and other interested parties or sent to such claimant and other interested parties by registered mail or by certified mail, and shall within twenty days after such hearing is had, by order, reject the claim or make an award in respect of the claim. If no hearing is ordered within twenty days after notice is given as provided in subdivision (b) of this section, the deputy commissioner shall, by order, reject the claim or make an award in respect of the claim.

A3

Exhibit 1

June 13, 1975

U.S. Department of Labor
Bureau of Employees Compensation
Office of Workmen's Compensation Program
Federal Building
Cleveland, Ohio 44199

9-4012-

Gentlemen:

I hereby authorize William M. Culbert, Attorney-at-Law, 609 Security Building, Toledo, Ohio 43604, to represent me in my claim for injuries suffered on or about 5-19-75 while employed at the Toledo Overseas Terminal, Inc., Toledo, Ohio.

Yours very truly,

✓ Joseph E. Duris

Joseph E. Duris

Social Security No. 279-30-9882

Culbert came in to office & executed file. I gave him 203's & file. He has admiralty as another attorney ltr 8/1/75

A4

Exhibit 2

4

OMB Approval No. 44R1

U. S. DEPARTMENT OF LABOR
Employment Standards Administration
Office of Workmen's Compensation Programs

EMPLOYEE'S CLAIM FOR COMPENSATION

CASE NUMBER: 9-4012

SEE INSTRUCTIONS ON REVERSE

1. NAME OF INJURED EMPLOYEE (TYPE OR PRINT): First name: Joseph; Middle initial: E.; Last name: Davis

4. DATE OF INJURY: 5-19-75

5. EMPLOYEE'S ADDRESS (Number, street, city, State, zip code): 1218 Hirzel Street, Toledo, Ohio 43605

6. [ ] MARRIED [X] UNMARRIED

7. SEX: [X] MALE [ ] FEMALE

8. AGE OR DATE OF BIRTH: 2-27-39

9. SOCIAL SECURITY NUMBER: 279 : 30 : 9882

10. ON DATE OF INJURY GIVEN →

11. HOUR BEGAN WORK: a. 8 A. M.

12. HOUR OF ACCIDENT: b. 10:05 A. M.

13. DID YOU STOP WORK IN ORDER TO ATTEND THE ACCIDENT? [X] YES [ ] NO

14. DATE AND HOUR YOU STOPPED WORK: 5-19-75

15. DATE AND HOUR YOU RETURNED TO WORK: Have not

16. OCCUPATION (Job title, type of work done, duties, etc.): Signalman

17. NUMBER OF YEARS IN THIS OCCUPATION: 15

18. WAGES OR EARNINGS (Include overtime allowances, etc.): a. WEEKLY

19. TOTAL EARNINGS FOR PREVIOUS YEAR

20. INJURED WHILE DOING WORK FOR: [ ] YES [ ] NO (If "No," explain in Item 24)

21. HOW MANY YEARS HAVE YOU WORKED FOR THIS EMPLOYER? 1 1/2

22. NUMBER OF DAYS USUALLY WORKED PER WEEK

23. NAME OF FOREMAN OR SUPERVISOR AT TIME OF ACCIDENT: John Nyers

24. EARLIEST DATE FOREMAN OR EMPLOYER KNEW OF ACCIDENT: 5-19-75

25. DID YOU STOP WORK BECAUSE OF THIS INJURY? [ ] YES [X] NO (If "Yes," on which date did you stop work?)

26. EXACT PLACE WHERE ACCIDENT OCCURRED (Street address, city, town, name of vessel, pier, terminal, etc.): Vessel REGENT BOTAN, docked at Toledo Overseas Terminal, 3319 St. Lawrence Drive, Toledo, Ohio 43605.

27. DESCRIBE IN FULL HOW THE ACCIDENT OCCURRED (Relate the events which resulted in the injury or occupational disease. Tell what the injured was doing at the time of the accident. Tell what happened and how it happened. Name any objects or substances involved and tell how they were involved. Give full details on all factors which led or contributed to the accident. If more space is needed, continue on other side.)

Leaving vessel, climbed up stairway on deck, turned, started down jacobsladder while holding onto arms of stairway; stairway was not secured and gave way, causing me to fall 20-25 feet to dock.

28. NATURE OF INJURY (Name part of body affected—fractured left leg, bruised right thumb, etc. If there was a loss of a part of the body, describe.): Multiple injuries - Fractured right wrist and left ankle and back - injured both feet, right shoulder and head - possible internal injuries.

29. HAVE YOU RECEIVED MEDICAL ATTENTION FOR THIS INJURY? [X] YES [ ] NO (If "Yes," give name and address of doctor, clinic, hospital, etc.)

Drs. Gosman, Rosenblatt & Boucouras
2321 Upton Avenue, Toledo, Ohio 43606
Guy W. Talmadge, M. D., 859 East Broadway, Toledo, Ohio 43605
Riverside Hospital, Toledo, Ohio 43604

30. WAS SUCH TREATMENT PROVIDED BY EMPLOYER? [ ] YES [X] NO

31. ARE YOU STILL DISABLED ON ACCOUNT OF THIS INJURY? [X] YES [ ] NO

32. HAVE YOU DONE ANY WORK FOR PAY OR PROFIT SINCE PERIOD OF DISABILITY? [ ] YES [X] NO

33. HAVE YOU RECEIVED ANY WAGES SINCE BECOMING DISABLED? [X] YES [ ] NO (If "Yes," give dates on back)

34. WAS INJURY RESULTED IN PERMANENT DISABILITY OR SUBSTANTIAL IMPAIRMENT? [ ] YES [ ] NO (If "Yes," describe or explain)

35. NAME OF EMPLOYER (Individual or firm name): Toledo Overseas Terminal, Inc.

36. NATURE OF EMPLOYER'S BUSINESS: Marine Terminal

37. ADDRESS OF EMPLOYER (Number, street, city, State, zip code): 3319 St. Lawrence Drive, Toledo, Ohio 43605

38. IF ACCIDENT OCCURRED OUTSIDE THE U.S. STATE WHETHER YOU [ ] ARE [ ] ARE NOT A U.S. CITIZEN [ ] YES [ ] NO

39. SIGNATURE OF PERSON CLAIMING COMPENSATION: x Joseph Davis

40. DATE: 1-15-76

Form CA-1 (Rev. Jan. 1974)

RECEIVED
FEB 11 1976
OWCP
NINTH DIST.
LONGSHORE

A6

Exhibit 3

LEAVE THIS SPACE BLANK

Case No. 9 4012
Insurance Carrier's No. 211 SE 3862

U. S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
OFFICE OF WORKMEN'S COMPENSATION PROGRAMS

2 11 76

OFFICE OF DEPUTY COMMISSIONER

Administering Longshoremen's and Harbor Workers' Compensation Act, as extended

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NOTICE TO EMPLOYER AND INSURANCE CARRIER THAT CLAIM HAS BEEN FILED

Gentlemen:

Enclosed is a copy of a claim for compensation which has been filed by Joseph E.Duris by his attorney, William Culbert under the Longshore Act.

You should proceed to pay compensation promptly when due as provided by Section 14 of the Longshoremen's and Harbor Workers' Compensation Act and to furnish medical treatment in accordance with Section 7(a) and (b) thereof, unless liability to pay compensation is controverted.

Section 14(d) provides that if the employer controverts the right to compensation he shall file with the deputy commissioner, on or before the 14th day after he has knowledge of the alleged injury or death, a notice stating that the right to compensation is controverted, the name of the claimant, the name of the employer, the date of the alleged injury or death, and the grounds upon which the right to compensation is controverted.

Under the regulations of this Office where claim is filed the employer or insurance carrier is required to file answer thereto within ten days from the date notice is received that claim has been filed.

Forms of notice of controversy and answer are enclosed for use in the event the right to compensation is controverted and the claim is to be opposed.

The original notice and answer should be filed with the deputy commissioner at the above office and copy thereof served upon the claimant either personally or by mailing it to the address given in the claim if you deny liability. Otherwise you should proceed to pay compensation immediately as provided by the said Act.

Sincerely,

John P. Traynor
Deputy Commissioner
Underwriters Adj. Co.
Enclosure
3450 W. Central Ave.
Toledo,Ohio 43606
Mr. Barber:.

Ltr. LS-21ja
Rev. June 1973

Exhibit 4

U.S. DEPARTMENT OF LABOR
Employment Standards Administration
Office of Workmen's Compensation Programs

1240 East Ninth Street
Cleveland, Ohio 44199

Memorandum of Conference File No. 9 4012

Joseph E. Duris

vs.

Toledo Overseas Terminals
Underwriters Adjusting Co.

Toledo, Ohio. August 19, 1976.

A Conference was held in this case on 8 19 76. Mr. Joseph E. Duris, the claimant, was represented by his attorney, Mr. William Culbert. Mr. Paul Wegner was present on behalf of the insurance carrier, the Underwriters Adjusting company.

The case was discussed. Mr. Duris is being paid compensation for Temporary Total Disability. He is still under the care of Dr. Rosenblatt. A Third Party Action is being contemplated.

It is recommended that the carrier continue payments of compensation until such time as facts or circumstances warrant termination or modification of such payments.

The carrier is requested to furnish copies of medical reports available to them regarding the condition of Mr. Duris. Mr. Culbert is request to furnish copies of medical reports that are not in the posession of the carrier. These reports should be forwarded to this office within 20 days of the date of this Memorandum.

John P. Traynor
Deputy Commissioner

9 2 76.

Mr. Joseph Duris
Mr. William Culbert, Attorney
Mr. Paul Wegner, Underwriters Adjusting Co.

Exhibit 5

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
OFFICE OF WORKERS' COMPENSATION PROGRAMS

MEMORANDUM OF INFORMAL CONFERENCE

(Under the Longshoremen's and Harbor Workers' Compensation Act, as extended)

1. Claimant	2. OACP File Number
Joseph Duris	9 4012
3. Employer	**4. Carrier Employer's Number**
Toledo Overseas Terminals	
5. Insurance Carrier	
Underwriters Adj. Co.	
6. Date of Conference (Month, day, year)	**7. Date of Injury** (Month, day, year)
2 17 77	5 19 75

8. Appearances:

[X] Claimant present [ ] Claimant not present

For Claimant Att. Wm. Culbert For Employer/Carrier Jerry Barber; Dave Gillian

Issues:
Continuance of Temporary Total
Rehabilitation process
Third Party Issue
Schedule of Loss of Wage Earning Capacity

See Recommendation.

cc/Rehab

9. The claimant sustained/alleges an accidental injury on the date in item 7 while working for the above-named employer, under the circumstances bringing the injury within the purview of the LHWC Act (33 U.S.C 901 et seq.) or an extension thereof, resulting in the following injury(ies):

Multiple injuries resulting from serious injury due to fall
Back Injury
Left Foot

10. Prior conferences were held on 8 19 76 Refer File
the employer/carrier have paid compensation for this injury in the amount of $ 6711.00
for the following periods: Med. $6404. (Approx)

Paid Temp. Total from date of injury to present and contin.

11. Present Claim:

Is being paid temp. total as carrier accepts present disability as precluding return to regular duty. Will attempt to discuss with employer possibility of returning to work on light duty (checker)

12. Employer/Carrier's Position

Accepts above.

13. Average Weekly Wage (Sec. 10) $ Min. $74.57 Comp rate [ ] As stipulated by parties [X] As recommended by examiner

14. Compensation rate (2/3 x Ave.) $74.57

Form LS-263
Dec. 1974

15. Claimant

- ☐ Returned to work on
- ☐ Has not returned to work
- ☐ Did not lose time

16. Medical costs related to the injury

- ☐ have been paid
- ☐ have not been paid

by the employer

Upon discussion of the issues involved among those present, together with due consideration to all information in the administrative file, the following recommendation is made.

RECOMMENDATION

Compensation is to be paid as follows:

Case should continue in present posture; claimant and carrier should attempt to obtain light duty work. Claimant states he does not want now active Rehab. work on his case but wants to attempt to return as a Checker. Carrier should note.

It is assumed that case will be finalized by Third Party Action. Parti should advise us of status of third party action.

Parties should advise us of any developments. Claimant is entitled to schedule(s) if third party action does not materialize.

Case file review by Rehab Institute as noted by carrier or Labor Rehab indicated. Medical review by Dr. Gosling as noted by carrier.

FEE

Approved Fee: Fee not set. Attorney must petition for fee in this matter as per regulations. Attorney should contact office for further info.

A written application for fee for services rendered has been submitted and duly considered, and accordingly, the above fee *(to include expenses)* is approved in favor of:

- ☑ This fee is for an attorney and is made a lien on the compensation recommended.
- ☐ There is no lien on the compensation.
- ☐ The fee is to be assessed to the employer or carrier

ACTION BY EMPLOYER CARRIER

The self-insured employer or insurance carrier is to submit Forms LS-206 or LS-208, showing compliance with the above recommendation. Upon completion of payment, a final Form LS-208 is to be submitted.

In the event of controversion, Form LS-207 is to be submitted.

To avoid statutory penalties all required forms should be sent to this office promptly and within the time requirements of the Act.

H. Levinson Examiner.

(Claims Examiner)

2 22 77.

(Date this memorandum issued)

(See 20 C.F.R. 701 et seq. for LHWC Act Regulations)

Exhibit 6

U.S. DEPARTMENT OF LABOR EMPLOYMENT STANDARDS ADMINISTRATION, OFFICE OF WORKERS' COMPENSATION PROGRAMS	MEMORANDUM OF INFORMAL CONFERENCE (Under the Longshoremen's and Harbor Workers' Compensation Act, as extended)

1. Claimant	2. OWCP File Number
Joseph Duris 9-401	
3. Employer	**4. Carrier Employer's Number**
Toledo Overseas Terminal, Inc	211 5E 3852

5. Insurance Carrier

Seaboard Surety & Marine - Underwriters Adjusting Company

6. Date of Conference (Month, day, year)	7. Date of Injury (Month, day, year)
September 22, 1978	May 10, 1975

8. Appearances:

[X] Claimant present [ ] Claimant not present

For Claimant Atty: Mr. Culbert For Employer Carrier Attys: Joseph Tuley

Issues:

Residuels of injury under Seciten 8

Admiralty Recovery

9. The claimant sustained/alleges an accidental injury on the date in item 7 while working for the above-named employer, under the circumstances bringing the injury within the purview of the LHWC Act (33 U.S.C. 901 et seq.) or an extension thereof, resulting in the following injury(ies):

Multiple body injury

10. Prior conferences were held on February 17, 1977 the employer/carrier have paid compensation for this injury in the amount of $ Paid Temporary Total for the following periods:

11. Present Claim:

Refer 8

12. Employer/Carrier's Position

In abeyance pending admiralty claim.

13. Average Weekly Wage (Sec. 10) $	14. Compensation rate (2/3 x 13)
[ ] As stipulated by parties [ ] As recommended by examiner	not established

15. Claimant

[X] Returned to work on April 21, 1977

[ ] Has not returned to work

[ ] Did not lose time

16. Medical costs related to the injury

[X] have been paid by the employer

[ ] have not been paid

Upon discussion of the issues involved among those present, together with the evidence in the administrative file, the following recommendation is made.

RECOMMENDATION

Compensation is to be paid as follows

Mr. Culbert should determine average wage for claimant as file indicates he has not been paid correctly. Mr. Culbert stated he WISHED file held in abeyance pending admiralty suite.

FEE

Approved Fee: not relevant

A written application for fee for services rendered has been submitted and duly considered, and accordingly, the above fee *(to include expenses)* is approved in favor of:

[ ] This fee is for an attorney and is made a lien on the compensation recommended.

[ ] There is no lien on the compensation.

[ ] The fee is to be assessed to the employer or carrier.

ACTION BY EMPLOYER CARRIER

The self-insured employer or insurance carrier is to submit Forms LS-206 or LS-208, showing compliance with the above recommendation. Upon completion of payment, a final Form LS-208 is to be submitted.

In the event of controversion, Form LS-207 is to be submitted.

To avoid statutory penalties all required forms should be sent to this office promptly and within the time requirements of the Act.

H. Levinson

(Claims Examiner)

October 1, 1979

(Date this memorandum issued)

(See 20 C.F.R. 701 et seq. for LHWC Act Regulations)

Exhibit 7

U.S. DEPARTMENT OF LABOR EMPLOYMENT STANDARDS ADMINISTRATION OFFICE OF WORKERS' COMPENSATION PROGRAMS	MEMORANDUM OF INFORMAL CONFERENCE (Under the Longshoremen's and Harbor Workers' Compensation Act, as extended)

1. Claimant	2. OWCP File Number
Joseph Duris	9-4012
3. Employer	**4. Carrier/Employer's Number**
Toledo Overseas Terminal, Inc.	211-SE-3562
5. Insurance Carrier	
Underwriters Adjusting Company	
6. Date of Conference *(Month, day, year)*	**7. Date of Injury** *(Month, day, year)*
October 23, 1980	May 19, 1975

8. Appearances:

[X] *Claimant present* [ ] *Claimant not present*

For Claimant Attorney William Culbert For Employer/Carrier Joe Duley, Claims Manager
Robert M. Foster, Senior Adjuste

Issues: Compensation for Permanent Partial Disability.

9. The claimant sustained/alleges an accidental injury on the date in item 7 while working for the above-named employer, under the circumstances bringing the injury within the purview of the LHWC Act (33 U.S.C 901 *et seq.*) or an extension thereof, resulting in the following injury*(ies)*:

Fell from ladder aboard ship onto dock. Accident resulted in a brokeen wrist, ankle and fractured back.

10. Prior conferences were held on _____
the employer/carrier have paid compensation for this injury in the amount of $ 7516.75
for the following periods: May 19, 1975 thru April 21, 1977.

11. Present Claim: Permanent partial disability for loss of use of the right wrist/hand left ankle and broken back.

12. Employer/Carrier's Position Upon receipt of the medical evaluation for permanent partial disability the carrier will give consideration of a settlement. Also the carrier will consider allocation for a certain amount of money for the special shoes for 20 year period for the claimant.

13. Average Weekly Wage (Sec. 10) $ _____ [ ] As stipulated by parties [ ] As recommended by examiner	14. Compensation rate (2/3 x AWW) $74.57 (Minimum)

5. Claimant

☒ Returned to work on April 22, 1977

☐ Has not returned to work

☐ Did not lose time

6. Medical costs related to the injury

☒ have been paid ☐ have not been paid by the employer

Upon discussion of the issues involved among those present, together with due consideration to all information in the administrative file, the following recommendation is made.

RECOMMENDATION

Compensation is to be paid as follows: It is recommended that current medical evaluation be done to show the permanent partial disability in percentage terms for the wrist/hand, ankle/foot, and back. Claimant incurred a fracture of the 3rd vertebra. No compensation is presently being paid. The last medical report by Dr. Hed B. Hein, M.D., is dated February 8, 1979. A Third Party claim has been filed. This does not prevent the interested parties to negotiate a settlement figure for permanent partial disability in this case. Claimant will be referred to Dr. Hein for an up-to-date evaluation. The carrier will refer claimant to a doctor of their choice if necessary.

This case is being held open for 45 days pending the medical report and the negotiation of the interested parties.

FEE

Approved Fee: Pending

A written application for fee for services rendered has been submitted and duly considered, and accordingly, the above fee *(to include expenses)* is approved in favor of:

☒ This fee is for an attorney and is made a lien on the compensation recommended.

☐ There is no lien on the compensation.

☐ The fee is to be assessed to the employer or carrier.

ACTION BY EMPLOYER/CARRIER

The self-insured employer or insurance carrier is to submit Forms LS-206 or LS-208, showing compliance with the above recommendation. Upon completion of payment, a final Form LS-208 is to be submitted.

In the event of controversion, Form LS-207 is to be submitted.

To avoid statutory penalties all required forms should be sent to this office promptly and within the time requirements of the Act.

Ruby L. Fallow

(Mrs.) Ruby L. Walton
(Claims Examiner)

October 30, 1980
(Date this memorandum issued)

cc: Mr. Duris cc: Attorney Culbert cc: Joe Duley cc: Robert Foster
(See 20 C.F.R. 701 et seq. for LHWC Act Regulations) cc: Employer

Supreme Court, U.S.
FILED
JAN 19 1983
ALEXANDER L. STEVAS
CLERK

No. 82-502

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

PALLAS SHIPPING AGENCY, LTD.,

Petitioner,

—against—

JOSEPH DURIS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF *AMICI CURIAE*

of American President Lines, Ltd., Apex Marine Corporation, Bay Tankers, Inc., Central Gulf Lines, Inc., Delta Steamship Lines, Inc., Farrell Lines Incorporated, Hudson Waterways Corp., Keystone Shipping Co., Lykes Bros. Steamship Co., Inc., Manhattan Tanker Company, Inc., Prudential Lines, Inc., Sea-Land Services, Inc., United States Lines, Inc.

FRANCIS X. BYRN
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Counsel for Amici Curiae

HAIGHT, GARDNER, POOR & HAVENS

Of Counsel

Question Presented for Review

1. Were the procedural requirements for assignment under section 33(b) of the Longshoremen's and Harborworker's Compensation Act (LHWCA) satisfied in this case?

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Consent of Parties

Both parties to this case have given their written consent to the filing of the Brief *Amici Curiae* in support of the Petitioner pursuant to Rule 36 (2) of the Rules of the Court. Such written consents have been filed with the Court.

Statement of Interest

Amici Curiae comprising thirteen United States flag steamship companies collectively offer a diverse geographical representation, constituting the overwhelming bulk of the American merchant marine concerned with third party actions brought pursuant to 33 U.S.C. §905(b) of the Longshoremen's and Harborworkers' Compensation Act.

Amici Curiae are interested in fostering the purposes of the 1972 amendments to the LHWCA, restated by this Court in *Rodriguez* v. *Compass Shipping Co. Ltd.*, 451 U.S. 596, 616 (1981) which include increasing the relative importance of statutory benefits as the favored method of compensation, rather than dissipating available financial resources in costly litigation.

If litigation is to be undertaken as permitted by 33 U.S.C. §905(b), *Amici Curiae* believe it should be done promptly by the party aggrieved. As this Court said in *Rodriguez supra* p. 617 footnote 41, "After the 1959 amendments, there is such a procedure: the employee may simply file his own third-party suit within six months after accepting compensation." If not, the action is to be assigned to his employer, the party primarily responsible for the safety of working conditions. *Scindia Steam Navigation Company* v. *De Los Santos* 451 U.S. 156, 176 (1981).

BRIEF AMICI CURIAE

Summary of Argument

In assessing the meaning and effect of section 33(b) of the Longshoremen's and Harborworkers' Compensation Act (LHWCA), the entire Act must be read as a whole, and the administrative practice, which of economic necessity stresses informal resolution and elimination of purposeless ceremony, must be taken into account. In this manner, the interpretation of a single provision can be reached which accords at once with the statutory scheme and administrative reality.

The lower courts are unanimous in holding that formal compensation orders are not required by section 33(b) of the LHWCA, 33 U.S.C. § 933(b). All that is needed is informal action acknowledging the claim and permitting payment of compensation.

Administratively, the Office of Workers' Compensation Programs, which handled more than 229,000 cases in fiscal year 1982, has complied with the statutory requirement that an award in a compensation order be made within thirty days after the filing of every claim, 33 U.S.C. § 919(b) and (c), by accepting the claim, giving notice to the employer, *Id.* § 919(b), and if there is no contest concerning the employer's liability compelling payment by regulation, effective in every case, 20 C.F.R. § 702.231, .233. Unless the parties raise a dispute, papers are not drawn, conferences are not held, and investigations are not pursued. The effect of an award is automatically had because the agreement of the parties triggers the regulatory requirement for compensation payment thereby eliminating the need to file forms of compensation orders. So too, where there is a contested claim informal adjudication is pursued, resulting, in the vast majority of cases, in an agreement between the parties. *Id.* § 702.301, .311. That agreement again triggers the regulatory requirement of pay-

ment, without the formality of filing forms of compensation orders. *Id.* § 702.315. This is not only an efficient way to handle the deluge of claims, it is the only sensible way of doing it.

A holding in this case that a paper entitled "compensation order" must be filed to satisfy section 19(c), 33 U.S.C. § 919(c) and section 33(b), 33 U.S.C. § 933(b) would add an enormous burden to already limited administrative resources. This burden would be entirely unjustified since it does not further the Congressional purposes underlying the six-month and award requirements of section 33(b). Those purposes were to give the longshoreman an opportunity to investigate and weigh his options, to provide the employer with timely access to relief from a negligent third party, and to reduce litigation by permitting employer review of the merits of third-party claims.

POINT I

The history of the LHWCA shows that Congress did not intend to permit compensation privileges to coexist with prosecution of a third-party liability claim until 1959 at which time such a right was granted provided the employee proceeded in a diligent manner, *i.e.* commenced suit within six months.

This case brings before this Court for review section 33 of the Longshoremen's and Harborworkers' Compensation Act, 33 U.S.C. § 933. The section was last analyzed by the Court in *Rodriguez* v. *Compass Shipping Co.*, 451 U.S. 596 (1981), wherein the nonstatutory conflict-of-interest exception to the assignment provisions of section 33(b) was strictly limited in light of 1959 amendments to this section and 1972 amendments to the Act. The case now before the Court requires definition of two phrases in section 33(b): "under an award in a compensation order filed by the Deputy Commissioner" and the further phrase "unless such person shall commence an action against such third person within six months after such award." The first

phrase was incorporated by a 1938 amendment, 52 Stat. 1168 (1938) and the second phrase was incorporated by a 1959 amendment, 73 Stat. 391 (1959).

As originally enacted in 1927, section 33 not only provided for the automatic assignment of all third party causes of action to the employer upon the acceptance of any compensation by the employee but also required the employee to elect whether to receive compensation or proceed with a third-party liability suit. 44 Stat. (part 2) 1429, 1440 (1927). This provision removed any potential for double recovery by the employee and avoided any possible confusion concerning the appropriate party to prosecute and control third-party litigation. The original provision shows clearly that Congress considered the assignment of third-party claims to be part of the *quid pro quo* for the employer's acceptance of absolute liability under the Act. *See* Gegan, *The Compensation Carrier's Right to Restitution for Medical Expenses Through a Lien on the Employee's Tort Recovery*, 52 St. John's L. Rev. 395, 397 n. 8 (1978) (discussing the New York State Workmen's Compensation Statute upon which the LHWCA was modeled).

In 1935, the United States Employees' Compensation Commission, which at the time had been charged with the administration of the LHWCA, submitted a draft bill to the 74th Congress intended to resolve administrative problems. Section 10 of that draft bill would have amended section 33(b) by incorporating the requirement that compensation be paid under an award in a compensation order before the statutory automatic assignment of the third-party claim was effected.[1] The proposed amendment did not change the provision in section 33(a), that the employee was required to elect either compensation or a third-party lawsuit.

The legislative reports and the hearings held in 1935 and 1938 (the amendment was passed by the 75th Congress) demonstrate

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[1]Senate Hearing Before a Subcommittee of the Committee on the Judiciary, on S.2791, 74th Cong., 1st Sess. at 1, 3 (July 23, 1935) (1935 Senate Hearing).

that the sole purpose of the amendment was to reduce, but not necessarily eliminate, the possibility of an unwitting assignment of third-party rights by giving the employee an opportunity "to find out the effect of such an acceptance before taking [compensation]".[2] Such an assignment was seen as particularly inappropriate in the case of serious injury because the total compensation benefits payable were arbitrarily limited to a maximum of $7500. 44 Stat. (part 2) 1429, 1434 (1927);[3] 1935 Senate Hearing at 14. However, the Commission did not recommend, nor did Congress enact, a requirement that the Deputy Commissioner or even the employer actually notify the employee of the assignment possibility. 1935 Senate Hearing at 14.

Notably, during hearings held on the amendment in the 75th Congress two proposals were presented to the Senate Committee which would have eliminated the election requirement contained in section 33(a), permitted the employee both to accept compensation and to pursue third-party litigation, and provided a statutory lien to the employer on any third-party recovery.[4] Neither of these proposals were enacted into law. Since the continued election required in section 33(a) terminated compensation benefits upon commencement of a third-party lawsuit by the employee, the need for a statutory lien on third-party recovery was apparently not recognized. *See* S. Rep. No. 428, 86th Cong., 1st Sess. at 1 (1959) (quoted *infra*).

Unfortunately, the amendments did not provide a time limit

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[2]Hearing Before Subcommittee No. 3 of the House Committee on the Judiciary on H.R. 8293, 74th Cong., 1st Sess. at 14 (July 31, 1935) (1935 House Hearing) (Introductory Remarks of Chief Counsel, Employees' Compensation Commission). *Accord* H.R. Rep. No. 1945, 75th Cong., 3rd Sess. 9.

[3]This limitation was increased and restricted by amendments in 1948, 62 Stat. 603; 1956, 70 Stat. 655; and 1961, 75 Stat. 203. It was finally removed entirely in 1972, Pub.L. 92-576, § 5(e).

[4]Hearings before a Subcommittee of the Senate Committee on the Judiciary on H.R. 5690, 75th Cong., 3rd Sess. 16-18 (April 7 and 13, 1938) (1938 Senate Hearings).

on the exercise of the election requirement and also did not provide for the situation where compensation without an award was accepted and thereafter an election was made to pursue a third-party claim under section 33(a). Any future compensation was then precluded, but past compensation was already spent. *See American Stevedores, Inc.* v. *Porello*, 330 U.S. 446, 454-456 (1947) wherein this Court suggested that the employer could protect itself by contravening its liability and thus forcing an award.[5] The courts thereupon fashioned an equitable lien to protect the employer's interest and to prevent a double recovery by the employee. *E.g. Fontana* v. *Pennsylvania R. Co.*, 106 F. Supp. 461 (S.D.N.Y. 1952), *aff'd sub nom., Fontana* v. *Grace Line, Inc.*, 205 F.2d 151 (2d Cir. 1953).

As explained in this Court's opinion in *Rodriguez, supra*, section 33(b) caused additional concern in 1956 because of a conflict of interest between the employer and employee resulting from *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956). The resulting 1959 amendment added the six-month provision and also deleted the election requirement, thus for the first time expressly providing for both the prosecution of third-party lawsuits and the acceptance of compensation by an employee. The Congressional understanding of the prior status of the law was stated in the Senate report which accompanied the Bill:

> "However, in exercising his right to sue a third party for damages under section 33 of existing law, the employee must choose whether to collect the compensation to which he is entitled or to pursue the third party suit. He may not pursue both courses."

S. Rep. No. 428, 86th Cong., 1st Sess. at 1 (1959).[6]

---

[5]Such unnecessary contravention appears to conflict with the spirit, if not the letter, of section 14(a), 33 U.S.C. § 914(a), which since 1927 has directed the prompt payment of compensation.

[6]As noted above, this statement is not complete, since it overlooks the possibility of a late election to bring suit.

Legislation was therefore drawn which was intended to protect both the employee's right to pursue a third-party lawsuit from a conflict of interest with his employer and the employer's interest in acquiring the rights to pursue that lawsuit should the employee fail to act diligently. The legislative reports and hearings demonstrate that Congress intended that the acceptance of compensation would result in consecutive rights to any third-party cause of action. The right would initially be in the employee; upon inaction by the employee the right would be given to the employer.

Congressman Zelenko was the author of H.R. 5357 which was submitted to the 84th Congress and incorporated the basic provisions relating to sections 33(a) and (b) eventually passed by the House on April 8, 1959. 105 Cong. Rec. 560-562 (1959). In the first statement made to the subcommittee considering H.R. 5357 during hearings held on May 23, 1956, Congressman Zelenko explained in part:

> "The employee is protected in his claim against the third-party at all times whether he accepts compensation or not. *An assignment of his rights to the employer comes into being only when he fails to avail himself of third-party remedy*. The employer is also protected. He may acquire the right of assignment and then proceed to recoup his loss. *The elimination of all rights of the employer to an assignment in the instant situation would be grossly unfair.*"[7] (emphasis added)

Congressman Zelenko continued his explanation under questioning by the members of the subcommittee:

> "Mr. McDowell. Is that the reason for the 6-month provision?

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[7]Hearings on Bills Relating to the Longshoremen's and Harborworkers' Compensation Act before a Special Subcommittee of the Committee on Education and Labor of the House of Representatives, 84th Cong., 2d Sess. 12 (May 23, 24 and June 11, 1956).

> Mr. Zelenko. I think that there should be *some length of time in which the parties can learn their rights.* Most of the time the longshoreman finds his own lawyer, but I have seen and heard of cases where many times this man does not know his rights, and sometimes through his employer, he finds out that he has certain rights because the employer is interested in getting this money back. If I had urged 10119, it would have been grossly unfair to the employer. In other words, *it would be practically left up to the longshoreman, and if he did not go ahead, the employer would lose any possible chance of getting back his compensation money.*"

Id. 14. (emphasis added)

So, too, the Senate report indicates the understanding of the full Senate Committee that in every instance the third-party rights would inure first to the benefit of the longshoreman-employee and then, upon inaction, to the employer.

> "Although an employee could receive compensation under the act and for the same injury recover damages in a third-party suit, he would not be entitled to double compensation. The Bill, as amended, provides that an employer must be reimbursed for any compensation paid to the employee out of the net proceeds of the recovery. In the event that an employee does not elect to sue for damages within 6 months of the compensation award the employer is assigned the cause of action. In the event that the employer institutes proceedings and makes a recovery, the employee receives four-fifths of the amount after necessary expenses . . . and all benefits and compensation have been deducted. Thus, by giving the employer a reasonable (one-fifth) share in the net recovery an incentive is provided not to compromise the suit

> only for the amount of compensation but to protect the interests of the employee as much as possible."[5]

S. Rep. No. 428, 86th Cong., 1st Sess. 2.

Following the 1959 Amendment, the assignment provision of the Act provided a reasonable six-month period within which the employee could investigate his options and pursue a third-party action without fear of a conflict of interest. With the 1972 removal of the arbitrary limitation on recovery, note 3 *supra*, and the substantial increase in benefits, it could also no longer be said that an employee's third-party action was much more valuable than the compensation remedy. Indeed, Congress in 1972 intended to make compensation the primary, usual and, in most instances, sole source of support. S. Rep. No. 92-1125, 92nd Cong., 2d Sess. 5. Consequently, the assignment of the claim cannot be viewed as a harsh result.

The assignment provision also continues to balance the employer's interest, by requiring that the employee act diligently so as not to jeopardize the employer's rights. Substantial delay of the assignment may not only present the employer with a stale claim, but also one that is time-barred. By reason of the substantial compensation benefits and this Court's decision in *Bloomer* v. *Liberty Mutual Ins. Co.*, 445 U.S. 74 (1980), the real party in interest in third-party litigation under the Act is almost invariably the employer to a greater or exclusive extent. The employee recovers nothing even in his own third-party case unless the verdict is at least 50 percent more than the past com-

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[5]The second and third sentences of this quote demonstrate possible cause of confusion. The reference to a statutory lien is plainly wrong. The employer's lien has always been nonstatutory in nature. *See, e.g. Bloomer* v. *Liberty Mutual Ins. Co.*, 445 U.S. 74 (1980). The third sentence makes no reference to a compensation order. To the contrary the phrasing of the sentence suggests that the six-month period runs from the receipt of compensation and, in any event, would happen in the course of every claim. As noted in Point II, the latter expectation is fully justified by section 19 of the Act.

pensation and medical payments, because the employer is entitled to its lien and, in the usual case, the attorney's fee is a one-third contingency. *Bloomer, supra.* Moreover, any excess amounts received in cases of continuing compensation benefits reduce the employer's future compensation liability. 33 U.S.C. § 933(f). The only arguable benefit directly to the employee, then, is the receipt of a lump sum payment of compensation that would otherwise have been paid over the course of time. Because of the possibility of waste, such a lump sum payment is not always in the best interest of the employee. *See* 1935 House Hearings 15, 34.

Finally, the recognized need for restraint in third-party litigation, *Bloomer, supra,* 445 U.S. at 83-84, suggests a third purpose in the continued assignment provision of the Act. Review of any possible third-party claim by the employer or the employer's insurer constitutes an added safeguard to ensure that the injuries are sufficiently significant and the cause of action sufficiently meritorious to justify the commencement of a lawsuit. *See Johnson* v. *Sioux City & New Orleans Barge Lines, Inc.,* 629 F.2d 1244, 1249 (7th Cir. 1980), *cert. denied,* 449 U.S. 987 (1980).

These threefold interests are well-protected by a rule that in uncontested claims the six-month period begins to run upon filing of the appropriate notice of compensation by the employer and the acceptance of compensation by the employee. In a contested case, the six-month period begins to run upon agreement of the parties and acceptance of compensation. Such an interpretation not only gives certainty to the assignment provision, but also accords with actual administrative practice.

POINT II

The scheme of the LHWCA and the administrative practice compel the conclusion that an award in a compensation order occurs upon agreement of the parties and acceptance of compensation.

The phrase "award in a compensation order" must be interpreted in accordance with the "realities of the situation rather than by the labels employed." *Sabol* v. *Merritt Chapman & Scott Corp.*, 241 F.2d 765, 767 (2d Cir. 1957). Accordingly, the courts have been unanimous in holding that a formal order is unnecessary. *Toomey* v. *Waterman S.S. Corp.*, 123 F.2d 718, 721 (2d Cir. 1941); *Liberty Mutual Insurance Co.* v. *Ameta & Co.*, 564 F.2d 1097 (4th Cir. 1977); *Rodriguez* v. *Compass Shipping Co., Ltd.*, 617 F.2d 955 (2d Cir. 1980), *aff'd*, 451 U.S. 596 (1981); *Simmons* v. *Sealand Services*, 676 F.2d 106 (4th Cir. 1982), *cert. denied*, 103 S.Ct. 242 (1982). An unduly strict interpretation would seriously undermine the Congressional understanding that the employee and employer would have consecutive rights to each third-party claim, introduce the gross unfairness of eliminating the employer's rights, and insulate nearly every third-party claim from the employer's independent review.

Under the Act, the employer's rights have been threatened and lost when, because of the administrative practice or the delay of the claimant, a formal award in a compensation order has not been issued at all or has been delayed until shortly before the expiration of a statute of limitations or other proscription. *Louviere* v. *Shell Oil Co.*, 509 F.2d 278 (5th Cir. 1975), *cert. denied*, 423 U.S. 1078 (1976); *Liberty Mutual Insurance Co.* v. *United States*, 290 F.2d 257 (2d Cir. 1961). These courts and others have strained to prevent the gross unfairness of depriving the employer of its assignment. In so doing, however, the *Louviere* court overlooked the relevant administrative practice and, instead, expanded a cause of action which defeated one of the primary purposes of section 33, *viz.* providing certainty as to the

proper party to bring suit and avoiding a multiplicity of litigation. *Sabol* v. *Merritt Chapman & Scott Corp.*, 241 F.2d at 767; *Toomey* v. *Waterman S.S. Corp.*, 123 F.2d at 721.

The statistical reports prepared by the Office of Workers' Compensation Programs for Fiscal Years 1975 through 1982 have been lodged with the Clerk's office for the convenience of the Court. Item 8 on each report shows the following number of cases received in each year: 168,975–1975; 198,566–1976; 208,617–1977; 220,925–1978; 234,280–1979; 243,831–1980; 255,220–1981; 229,868–1982. Items 9 and 10 show that the following numbers of cases were closed without payment of compensation: 135,247–1975; 162,206–1976; 171,870–1977; 178,806–1978; 179,921–1979; 187,846–1980; 195,936–1981; 176,056–1982. Consequently, the number of new cases involving payment of benefits in 1975 were approximately 30,000 and in each year after that the number has increased to a high of nearly 60,000 such cases in 1981. Items 11 and 12 show that closed cases following compensation payment ranged from 23,000 in 1975 to more than 40,000 in 1979 and each year thereafter.

Adjudication procedures (*see* 20 C.F.R. 702.301 *et seq.*) are reported in items 15-19. In 1975, there were 13,167 adjudications, *i.e.* written, filed recommendations to pay compensation or provide medical care. The number of such adjudications rose in 1979 to 32,000 and in 1980, 1981 and 1982 these adjudications numbered more than 40,000. On the other hand, compensation orders after formal hearings numbered 280 in 1975, 454 in 1976, 738 in 1977, 746 in 1978, 1,103 in 1979, 1,370 in 1980, 1,393 in 1981, and 1,361 in 1982. Thus compensation orders were necessary in less than two percent of the disputed claims and a far smaller percentage of all claims, disputed or not. Plainly, the administrative practice stresses informal action, and minimizes administrative involvement to conserve administrative resources.

The regulations issued by the Secretary of Labor pursuant to the authority granted in 33 U.S.C. § 939 are specifically designed

to encourage this informal, but effective, administrative review. Thus, the 1973 Revision of the Regulations included the introductory comment:

> "The most significant change is in §§ 702.301 through 702.319, governing adjudication of claims by the Deputy Commissioners. As changed, the procedure is much more informal, and is in keeping with the manner in which such problems have actually been handled over the years."

38 Fed. Reg. 26860 (September 26, 1973). The intent of the 1977 Amendments to the Regulations was explained by the Department of Labor as follows:

> "The Amendments will enable the Department of Labor to process in a more efficient and timely manner the increasing number of claims filed each year."

42 Fed. Reg. 45300 (September 9, 1977). The primary concern in proposing these amendments was to avoid "unnecessary delays in the processing of claims" *Id.; Ambrosino* v. *Transoceanic S.S. Co.*, 675 F.2d 470, 472 (2d Cir. 1982); *see Barulec* v. *Skou*, 471 F. Supp. 358, 360-62 (S.D.N.Y. 1979), *aff'd*, 622 F.2d 572 (2d Cir. 1980), *aff'd*, 451 U.S. 596 (1981). The informal procedures stressed by the Regulations are an attempt to meet the statutory requirement that an award in a compensation order be issued within thirty days of the filing of *every* claim, 33 U.S.C. § 919(b), (c), and yet not sacrifice the ability of the administrative agency to process claims on the altar of formality.

20 C.F.R. § 702.201 *et seq.* specifies the procedures followed by the Office of Workers' Compensation Programs (OWCP) in the processing of claims. Formal compensation orders are unnecessary, because by regulation every agreement to pay compensation gains the status of such an order by the regulatory requirement that payment be commenced immediately. The absence of any practical necessity for formal compensation orders reduces these documents to formalities. Thus, 20 C.F.R.

§ 702.231 concerning "noncontroverted claims" requires every employer to "pay periodically, promptly and directly to the person entitled thereto the benefits prescribed by the Act", unless the employer controverts his liability. 20 C.F.R. § 702.233 imposes a 10 percent penalty for late payment of compensation regardless of the formal issuance of an award. Reports of commencement and suspension of payments must be made to the OWCP. *Id.* § 702.234. Subpart c, *Id.* § 702.301 *et seq.*, specifying the adjudication procedure for contested and controverted claims, stresses in the opening section that its purpose is to resolve controversies amicably and promptly through informal procedures. That resolution is sought at the earliest practicable date. 20 C.F.R. § 702.311. Upon reaching an agreement by telephone, written correspondence or informal conference, the duty to pay compensation attaches immediately. The Regulations thus abolish the need for individual formal compensation orders to resolve these amicably disposed of claims and allow the OWCP to devote its resources to the actual resolution of claims.

This administrative practice demonstrates that the requirement that a compensation order be issued within thirty days of the filing of every claim, 33 U.S.C. § 919(b), (c), and the corresponding terminology in section 33(b) must be interpreted to include, in uncontested claims, the filing of the appropriate forms and the commencement of compensation pursuant to the regulatory directions, and in the case of contested claims the agreement and consequent payment of compensation.

The Fourth Circuit in *Simmons* v. *Sealand Services, Inc.*, *supra*, accurately identified the attributes of an award as used in actual practice and in furtherance of the articulated legislative purposes of section 33(b). The Court found:

> "[T]he essence of an award is 'an act of ratification of compensation, whether formal or informal, and the subsequent acceptance by the claimant.' 564 F.2d at 1102. In addition, the award serves the dual purpose of protecting the welfare

> and rights of the longshoreman while not unduly delaying the employer's access to relief from the negligent third party."

676 F.2d at 109. The Court therefore found three events to be necessary to a finding of award: the initiation of compensation payments, without contravention; the filing of the employer's notice, 20 C.F.R. § 702.234; and the acceptance of the payments. *Id.* As shown by the review of administrative practice and regulations above, these are precisely the events which trigger the regulatory requirement for payment, 20 C.F.R. § 702.231 *et seq.*

The Fourth Circuit formulation accords fully with the actual statutory purpose which was only to provide an opportunity to investigate and weigh options. Such an opportunity is provided in every claim by the six-month period. This formulation also is in full accord with the congressional intent both to remove all uncertainty concerning the proper party to commence suit and to provide the employer with the right of review and access to relief in a timely fashion on every claim. Perhaps of greatest significance, this formulation also accords with the administrative practice, recognizing as it does the actual administrative compliance with the demands of section 19(b), (c).

The Second Circuit in *Rodriguez* v. *Compass Shipping Co., Ltd., supra,* 617 F.2d 955, recognized these very same administrative realities in the context of contested claims resolved pursuant to the informal adjudication procedures specified in 20 C.F.R. § 702.301 *et seq.* By looking to the realities of the situation rather than to the labels employed, the Court concluded that agreement on such a contested claim, invoking as it does the immediate duty to pay compensation, is the award contemplated by section 33(b). Although noting the limited purpose of the 1938 Amendment, the Court nonetheless attributed far more protection to that amendment than was actually intended by Congress. According to the Second Circuit, the award lan-

guage was inserted "to *insure* that the claimant-employee knew that he was foregoing his right to sue by acceptance of the compensation agreement." 617 F.2d at 959 (emphasis added), *citing* 1938 House Report No. 1945, 75 Cong., 3rd Sess. at 9 (1938). That House Report, however, only specifies the intent to give an opportunity for consideration of the employee's options, not a requirement of actual notice. There has never been a requirement that the employee be actually notified by the Deputy Commissioner or employer of the possible assignment. 1935 Senate Hearings at 14; 1938 Senate Hearings at 16-18.[9] In fact, such a requirement was included in the 1959 House bill, 105 Cong. Rec. 5560-62, but was deleted by Senate amendments, to which the House acceded, 105 Cong. Rec. 15343.

Despite the appropriate resolution of the question in the context of contested claims, the Second Circuit reached an erroneous ruling in the context of uncontested claims. *Verderame* v. *Torm Lines*, 670 F.2d 5 (2d Cir. 1982). Verderame was injured on June 3, 1975 and immediately filed a claim for compensation benefits under the LHWCA. Temporary total disability was not contested and the first payment was made on June 6, 1975. Temporary total disability continued until August 31, 1978, totaling $37,540.37. On October 27, 1978 a formal compensation order was issued directing the payment of an additional $17,824.84. Notably, by the time the formal compensation order awarding the additional $17,824.84 was issued, more than three years had elapsed from the date of injury. Verderame's third-party suit was untimely under section 33(b), if the initial uncontested temporary total disability payment was considered an award, but was timely if the compensation order was considered the only award in the case. The opinion is unclear as to whether the additional monies awarded by order dated October 27, 1978

[9]This overstatement of Congressional purpose resulted in an erroneous decision. *D'Amico* v. *CIA de Nav. Mar. Netumar*, 677 F.2d 249 (2d Cir. 1982). The Court appears to have required a showing of actual notice of the assignment to an employee who negotiated a $13,000 settlement of his compensation claim, without assistance of counsel.

consisted solely of permanent partial disability benefits or also represented some continuing claim for a deficient temporary total disability payment. In any event, the Second Circuit held, reversing the District Court, that the six-month period would not begin to run until after the longshoreman knows "what his award of compensation benefits will be." Thus, the six-month period was held to have started on the date when the agreement underlying the compensation order was reached. 670 F.2d at 8.

The error in this decision is its requirement of finality in the compensation proceedings. No such requirement is evident in the statutory language, and such a requirement would contradict the statutory scheme. Indeed, the delay of more than three years amply illustrates the difficulties caused by such an interpretation. Moreover, the congressional purposes in enacting the amendments of 1938 and 1959 were again not nearly as broad as described by the Second Circuit at 670 F.2d at 7. As has been shown above, that purpose was solely to provide a reasonable period of six months within which the longshoreman could investigate and decide whether to bring suit.

Section 19 of the Act specifies the procedures for resolution of claims. The LHWCA contemplates five types of compensation, *i.e.* permanent total disability, 33 U.S.C. § 908(a); temporary total disability, *Id.* § 908(b); permanent partial disability, *Id.* § 908(c); temporary partial disability, *Id.* § 908(e), and death benefits, *Id.* § 908(d). Of necessity, claims for permanent partial disability are usually preceded by claims for temporary total disability or temporary partial disability. *See Id.* § 908(c) (permanent partial disability to be "in addition to compensation for temporary total disability or temporary partial disability. . . ."). So too, a finding of permanent total disability is rarely, if ever, appropriate at the beginning of a case. Rather, such a finding is almost invariably preceded by a lengthy period of temporary total disability benefits until the requisite permanency can be determined.

Claims for temporary total disability and temporary partial

disability are no less subject to the section 19(b) and (c) requirement that awards be rendered within 30 days of a filing of a claim unless a hearing is requested. The words of the statute are clear and mandatory: "the deputy commissioner shall, by order, reject the claim or make an award in respect of the claim," 33 U.S.C. § 919(c), within 20 days after notification is given to the employer. That notice, under section 19(b), *Id.* § 919(b), is required to be given within 10 days of the filing of the claim. The contemplation of the Act, therefore, is that an award in a compensation order will be given on every claim and unless a hearing is requested or ordered that compensation order will be made within 30 days of the filing of the claim. Even when a hearing is ordered, the order must be made within 20 days of the hearing, *Id.* § 919(c). This requirement of speedy resolution of compensation claims dovetails with the section 33(b) language, demonstrating that the six-month period was intended to begin within 30 days of the filing of any uncontested compensation claim.

The Sixth Circuit, in the instant case, failed to consider the import of 33 U.S.C. §919(b), (c) and the efficient manner in which the OWCP has met the statutory directive. In addition, the circuit court erroneously relied on *Federal Marine Terminals, Inc.* v. *Burnside Shipping Co.*, 394 U.S. 404 (1969).[10] The 1972 amendments to the LHWCA raise a very serious question concerning the continuing viability of this decision. Not only does the decision encourage litigation contrary to the express intent of the 1972 amendments, but it may also be barred by the language of section 5(b), 33 U.S.C. §905(b). That section directs that the negligence action of the employee, or anyone otherwise entitled to recover damages by reason of the employee's injury against a vessel, be brought in accordance with section 33, and

[10]A third weakness in the Court's opinion is reliance on a conflict of interest due to a possible business relationship between the stevedore and vessel. As noted by this Court, *Rodriguez, supra*, 451 U.S. at 615 n. 34, that possible business relationship was addressed by Congress in repealing the election requirement and providing the six-month period in 1959.

proscribes all remedies against the vessel other than as provided in section 5(b) or under the Act. If Congress' intent to provide a comprehensive set of procedures to deal with compensation liability and its possible recoupment were not evident in 1969, that intent was made manifest at least with respect to the employee, employer and vessel by the 1972 amendments. *See Rodriguez, supra,* 451 U.S. at 615; *Landon* v. *Lief Hoegh & Co.,* 521 F.2d 756, 761 (2d Cir., 1975), *cert. denied,* 423 U.S. 1053 (1976).

If *Burnside* continues to exist after the 1972 amendments, its dissonant note threatens to upset the balance struck by Congress. Thus, recognition of the employer's nonstatutory claim for recoupment of compensation expenses raises the evil of multiple litigation to recoup the same loss, with the risks of inconsistent or duplicative recoveries. Unquestionably, such a nonstatutory claim does not divest the employee of a timely third-party lawsuit. The employee's lawsuit, however, includes damages which are duplicative of the compensation expenses, *Pope & Talbot* v. *Hawn,* 346 U.S. 406, 411-12 (1953); *Edmonds v. Compagnie Generale Transatlantique,* 443 U.S. 256 (1979). Those damages cannot be excised without an abolition of the employer's lien. That lien, however, has been accepted as an integral part of section 33 of the LHWCA, 105 Cong. Rec. 12674 (July 6, 1959); *Bloomer, supra,* 445 U.S. at n. 6. Thus, *Burnside* invites the prosecution of either two suits at once to recoup the same damages, or consecutive suits where the success of the first might permit the use of offensive collateral estoppel in the second, but the failure of the first would not bar the second.

In short, an unsatisfactory state of affairs, unless the compensation expense is solely the employer's damages and not a part of the employee's suit. Such a division of damages recognizes the real party in interest and also removes the need for the equitable lien. Although concededly a major step, it is not beyond the power of this Court to take. Indeed, such a step would remove the major inequity existing under the present in-

terpretation of the LHWCA: the exoneration of a stevedore, whose negligence contributes substantially to the employee's injury. *Edmonds, supra,* 443 U.S. at 270, 273; *Zapico* v. *Bucyrus Erie Co.,* 579 F.2d 714, 725-26 (1978); *See* H.R. Rep. No. 95-997, 95th Cong. 3d Sess. 60-61 (1978); Cooper & Co., *A Causal Study of Accidents in the Longshoring Industry and OSHA's Effectiveness* 3 (1975) (commissioned by OSHA). That exoneration would be abolished through application of the comparative negligence rule in the stevedore's separate action. This solution also maintains the statutory compensation liability limit since the employer's suit would be limited to the amount of compensation expenses, and counterclaims would continue to be barred by 33 U.S.C. §905(a) and (b). Such a solution has the obvious benefit, endorsed by this Court and by Congress, of encouraging safety by placing the burden on the party "whose default caused the injury. . . ." *Italia Societa per Azioni di Navigazione* v. *Oregon Stevedore Co.,* 376 U.S. 315, 324 (1964); S.Rep. No. 1125, 92nd Cong., 2nd Sess. 2 (1972); H.R.Rep. No. 1441, 92nd Cong. 2d Sess. 1 (1972).

The Sixth Circuit's reliance on *Burnside* is misplaced. The precedence and scope of that decision has always been subject to question. That questioning becomes all the more acute by reason of the 1972 amendments.

Review of the scheme of the Act, the administrative burdens, and the administrative practice reveals the need for a practical approach to the interpretation of sections 19 and 33 of the LHWCA. Such an approach has been approved by the Courts since the decision in *Toomey* v. *Waterman S.S. Corp.,* 123 F. 2d 718, 721 (2d Cir. 1941). That approach accomplishes the legislative objectives, while preserving the viability of a Congressional enactment. Thus, the agreement to pay compensation, the filing of the appropriate notice with the OWCP and the acceptance of compensation constitute the award in a compensation order required by section 19 and referred to in section 33 of the Act.

Conclusion

The decision of the United States Court of Appeals for the Sixth Circuit should be reversed with a direction to remand the case to the district court for entry of an order dismissing the complaint.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PALLAS SHIPPING AGENCY, LTD.,
Petitioner,

vs.

JOSEPH DURIS,
Respondent.

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Report, House Committee No. 1945, 75th Cong., 3d Sess. 9 on the 1938 Amendments 18

No. 82-502

In The

Supreme Court of the United States

October Term, 1982

PALLAS SHIPPING AGENCY, LTD.,

Petitioner,

vs.

JOSEPH DURIS,

Respondent.

BRIEF AMICUS CURIAE ON BEHALF OF ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF JOSEPH DURIS, RESPONDENT,

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

CONSENT OF PARTIES

Pursuant to Rule 36 of the U. S. Supreme Court Rules, this Brief Amicus Curiae is being filed with the written consent of all parties to the case, copies of which are attached hereto, in support of Joseph Duris, Respondent.

STATEMENT OF INTEREST

This Brief Amicus Curiae is being submitted by the Admiralty Law Section of the Association of Trial Lawyers of America, a national Bar Association consisting of more than 50,000 lawyers who primarily represent Plaintiffs in personal injury and death litigation and workmen's compensation. The Admiralty Law Section includes most of the attorneys throughout the United States who specialize in Maritime Personal Injury Law.

The pending case is of great importance and will decide the maritime law on the question presented. It will affect the welfare of many Plaintiffs in maritime cases now pending throughout the United States.

We believe that, based on our research and analysis of the law and our experience in the maritime law and the interests of safety of workmen on board vessels, our brief argument will be of assistance to the Court.

Our Brief will be limited to the following questions presented without any reference or review of the facts.

QUESTION PRESENTED

Whether the mere acceptance of workmen's compensation, paid voluntarily by the employer under the Longshoremen's and Harbor Workers' Compensation Act, without the entry of an award or an order requiring payment of compensation filed by the Deputy Commissioner or Benefits Review Board, is sufficient to trigger the assignment provision of 33 U.S.C. § 933 (b)?

SUMMARY OF ARGUMENT

In its present form, § 33 of the Longshoremen's and Harbor Workers' Compensation Act permits the injured employee to receive compensation from his employer and also pursue his claim for damages against a negligent third party. The employee is not

required to elect between these remedies. The Section provides that only if the employee accepts compensation "under an award in a compensation order filed by the deputy commissioner or Board," the third party claim is assigned to the employer unless the employee commences such action "within six months after such award." The decision of the Sixth Circuit herein correctly interprets not only the wording of the statute but also the intent of Congress to prevent an unwitting assignment by the injured employee, and should be affirmed.

As reasonably enacted with the Act in 1927, § 933 required the injured employee to elect whether to receive compensation from his employer or pursue his potential third party claim. The acceptance of any compensation operated as an automatic assignment to the employer of claims against third parties. In 1938, Congress amended § 933 to eliminate this harsh result, so that the statute

provided that only the acceptance of compensation "under an award in a compensation order filed by the deputy commissioner" worked an assignment of the third party claim to the employer. Only a final award, fixing the total compensation payable to the employee, would cause such assignment. The acceptance of voluntary compensation payments clearly did not. In 1959, Congress again amended § 933, to further expand the rights of the injured employee, by delaying the assignment of third party claims until six months after the acceptance of compensation "under an award in a compensation order filed by the deputy commissioner." Thus, the Section still requires an affirmative order by the deputy commissioner or other agency of the U. S. Department of Labor, both fixing the total amount of compensation and requiring that it be paid, before the assignment provision is triggered.

The decision of this Court in Rodriguez v. Compass Shipping Co., 451 U.S. 596 (1981), compels that the Section be given that reading, the language therein being unequivocal. Rodriguez compels affirmance of the present case.

The overly-broad reading of § 933 urged by the Petitioner disregards the language of the statute itself, as well as the mandate of this Court that the Act be liberally construed in favor of the injured employee. Such interpretation would produce the exceedingly harsh result of imposing a six month statute of limitation on the injured employee and is completely unnecessary to protect the rights of employers under the Act. The General Maritime Law clearly requires that the employer be reimbursed its compensation payments out of the injured employee's third party claim and clearly permits the employer to pursue the third party itself, without statutory assignment.

The result of a six month limitation upon the injured employee, as urged by the Petitioner, would be the unfortunate flooding of the Courts with suits which would have to be filed without any reasonable opportunity for investigation or opportunity to weigh the economic impact of the injury. Many of such suits would be without merit, while many meritorious claims would be lost unwittingly by the injured employee. To avoid such harsh results, the shipowner should not be permitted to create by slight of hand an award where none exists.

ARGUMENT

CONGRESS CLEARLY DID NOT INTEND THAT THE MERE ACCEPTANCE OF WORKMEN'S COMPENSATION BY A LONGSHOREMAN, PAID VOLUNTARILY BY HIS EMPLOYER UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, SHOULD TRIGGER THE ASSIGNMENT PROVISION OF 33 U.S.C. § 933 (b). ONLY THE ACCEPTANCE OF COMPENSATION PAID PURSUANT TO "AN AWARD IN A COMPENSATION ORDER FILED BY THE DEPUTY COMMISSIONER OR BOARD" SHOULD WORK THE ASSIGNMENT OF THE LONGSHOREMAN'S THIRD PARTY CLAIM TO HIS EMPLOYER, SIX MONTHS AFTER SUCH AN AWARD.

The present case requires an interpretation of the language selected by Congress in § 33 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 933, which relates to the prosecution of third party claims by an injured longshoreman after payment of compensation by his employer. In its present form, the relevant portions of that section provide as follows:

> "(a) If on account of a disability or death for which compensation is payable under this Act the person entitled to such compensation determines that some person other than the employer or person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.
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> (b) Acceptance of such compensation under an award in a compensation order filed by the Deputy Commissioner or Board shall operate as an assignment to the employer of all rights of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award." [Emphasis added.]

In its recent decision in Rodriguez v. Compass Shipping Co., Ltd., 451 U.S. 596 (1981), this Court held that once an award had been entered, and the longshoreman failed to file suit within six months thereafter, § 933 (b) worked an absolute and irrevocable assignment to the employer or compensation carrier of any rights against a third party. However, the Court made it clear that it assumed, for the purposes of that decision, that an award or an order requiring payment of compensation had been entered in each of the companion cases. Rodriguez, 451 U.S. at 598, fn. 3. In fact, in each of the three cases consolidated therein an order of some type had been entered by the Deputy Commissioner, Administrative Law Judge or Benefits Review Board, either after litigation or formalizing a settlement agreement between the parties, fixing the total amount of compensation owed the employee and requiring payment of that compensation. See, for

example, Rodriguez v. Compass Shipping Co., Ltd., 456 F.Supp. 1014 (S.D.N.Y. 1978), affirmed, 617 F.2d 955 (2nd Cir. 1980).

The question presented in the case now before the Court is the meaning of the words "award in a compensation order filed by the Deputy Commissioner or Board" used by Congress in § 933 (b) to define the event which triggers the six month period which could culminate in an assignment of the employee's rights against third parties to the employer. The Petitioner contends that a voluntary payment of workmen's compensation to the employee, coupled with the filing, by the employer, of report forms LS-206 and LS-208 (both required of the employer in all cases under the Act) somehow constitutes "an award in a compensation order filed by the Deputy Commissioner or Board."

The Decision Below

Responding to the same contention by the shipowner-petitioner below (there being no dispute as to the material facts) the Sixth Circuit first set out the procedure for payment of compensation established by the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901, et seq., as follows:

> "Shortly after his injury, Duris began to receive benefits under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq. Under that statute and its regulations, injured employees receive compensation in one of two forms. If the employer controverts the claim, any benefits are paid pursuant to an award documented in a compensation order. 33 U.S.C. § 914; 20 C.F.R. §§ 702.251-.351 (1981). If, on the other hand, the claim is not contested, compensation is paid voluntarily without an award. 33 U.S.C. § 914, 20 C.F.R. §§ 702.231-242 (1981). It is undisputed that Duris' benefits were paid voluntarily; the Secretary of Labor entered no compensation order or award in this case." [684 F.2d at 353.]

The Court below, in rejecting the contention now made by the Petitioner herein, stated and explained its holding in the following words:

> "We will not, therefore, read Section 33 to encompass all claims paid under the Act. Where, as here, the injured employee has merely accepted compensation payments, no assignment occurs and the third party claim does not expire in six months. The Second Circuit gave due consideration to the policy against unwitting assignments and reached a similar conclusion. Rodriguez v. Compass Shipping Co., Ltd, 617 F.2d 955 (1980), affd. on other grounds, 451 U.S. 596 (1981).
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> Our holding today is that the mere receipt of compensation benefits under the Act does not trigger the assignment provisions of Section 33 (b). Hence, Duris' claim is not time barred." [684 F.2d at 355.]

We respectfully submit that the decision by the Sixth Circuit in the present case is an imminently correct interpretation of the intent of Congress and the wording contained in § 933 (b) and should be affirmed by this Court.

Section 933 in the 1927 Act

The present case calls upon the Court to interpret amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901, et seq., which was originally enacted in 1927. However, the amendments to the Act under consideration herein are those adopted by Congress in 1938 and 1959, wherein § 933 (b) was substantially changed from its original wording. The 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act made no change in the wording of this Section, except for the reference to a compensation award by the "Board," to accomodate the administrator of appeals to the Benefits Review Board, added by the 1972 amendments.

When enacted as part of the original Longshoremen's and Harbor Workers' Compensation Act in 1927, § 933 (§ 33, 44 Stat. 1440) provided as follows:

> "(a) If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the Deputy Commissioner in such manner as the commission shall provide, to receive such compensation or to recover damages against such third person.
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> (b) Acceptance of such compensation shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person, whether or not the person entitled to the compensation has notified the deputy commissioner of his election."

Under this wording, as the Section was originally enacted, the Courts held that acceptance of any workmen's compensation precluded the employee from suing a third party tortfeasor. Sciortino v. Dimon S.S. Corp., 39 F.2d 210 (E.D.N.Y. 1930), affirmed, 442 F.2d 1019 (2nd Cir. 1930); Johnsen v. American-Hawaiian S.S. Co., 98 F.2d 847 (9th Cir. 1938).

The Act also required by § 914 that, unless liability for compensation was

contested, the employer must begin payment of workmen's compensation within two weeks of the injury. It quickly became apparent that, because of the combination of the prompt payment requirement of § 914 and the election of remedies mandate contained in § 933, a substantial injustice was being worked upon the injured longshoreman. At the time he was least able to do so, he was forced to make an election between his limited but relatively automatic compensation remedy and his potential damage remedy against a negligent third party.

The 1938 Amendment

To eliminate this harsh result of what was intended to be remedial legislation, Congress amended § 933 in 1938 (June 25, 1983, c. 685, §§ 12, 13, 52 Stat. 1168) to read as follows:

> "(a) If on account of a disability or death for which compensation is payable under this chapter the person

entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy commissioner in such manner as the commission may provide, to receive such compensation or to recover damages against such third person.

(b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person." [Emphasis added.]

The Section was so worded when American Stevedores v. Porello, 330 U.S. 446 (1946) came before this Court. The contention was made that, regardless of the wording of the 1938 amendment, the acceptance of compensation nonetheless operated as an election not to sue the third party. In disposing of that contention and interpreting the intent of Congress by that amendment, this Court stated:

"When impleaded by the United States in the trial court, American, the Petitioner here, pleaded as an affirmative defense that Porello, having accepted compensation payments from

American, lost whatever right of action he had against the United States as a third party tortfeasor. The Petitioner admits that § 33 (b) of the Longshoremen's Act was amended in 1938 so that mere acceptance of compensation, without an award, does not operate as an assignment to the employer of the injured employee's cause of action against a third party tortfeasor, a conclusion which Courts had reached under the former wording of the Act. But it contends that the amendment did no more, and that acceptance of compensation still operates as a conclusive election not to sue. It is quite clear that mere acceptance of compensation is not the kind of election for which provision is made by § 33 (a) of the Act, which provides for notice of intention to the deputy commissioner, so the argument is technically imperfect. But in any event, election not to sue a third party and assignment of the cause of action are two sides of the same coin. Surely the Act was never intended and has never been held to provide that after acceptance of compensation, and until an award, neither employer nor employee could sue the third party tortfeasor. If so held, an employer who was not responsible over to the third party might lose his chance to recoup compensation payments from the third party, while the third party might escape all liability. . . .

Congress has provided that unless an employer controverts the right of the employee to receive compensation, he must begin payments within two weeks of the injury. The employee thus receives compensation payments quite soon after

his injury by force of the Act. Yet the Act does not put a time limitation upon the period during which an employee must elect to receive compensation or to sue, save the general limitation of one year upon the time to make a claim for compensation. The apparent purpose of the Act is to provide payments during the period while the employee is unable to earn, when they are sorely needed, without compelling him to give up his right to sue a third party when he is least fit to make a judgment of election. For these reasons we think that mere acceptance of compensation payments does not preclude an injured employee from thereafter electing to sue a third party tortfeasor." [330 U.S. at 454-456. Emphasis added, footnotes omitted.]

The foregoing interpretation of the 1938 amendment was completely consistent with the intent of Congress, as reflected in the Committee report accompanying the amendment.[1]

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1. The amendment's purpose was expressed in the House Report:

> "The purpose of this amendment is to remove possible cause of complaint regarding the operation of the provision

Thus, the legislative history clearly indicates that Congress intended that there must be some affirmative official action by the deputy commissioner, or other agency of the U. S. Department of Labor, establishing an award of compensation, before the employee's acceptance of compensation could consti-

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of subdivision (b) of Section 33 in making the mere acceptance of compensation work automatically an assignment to the employer of all rights of action against the third party tortfeasor. Acceptance of compensation without knowledge of the effect upon such rights may work grave injustice. The assignment of this right of action against the third party might properly be contingent upon the acceptance of compensation under an award in a compensation order issued by the deputy commissioner, thus giving opportunity to the injured person . . . to consider the acceptance of compensation from the employer with the resulting right to bring suit in damages against the third party, or a refusal of compensation so as to pursue the remedy against the third party alleged to be liable for the injury." H R Rep No. 1945, 75th Cong., 3d Sess. 9 (1938). See Rodriguez v. Compass Shipping Co., 451 U.S. at 605.

tute an assignment of his claim against third parties. Decisions from the Circuits were in accord that § 933 (b) required an affirmative order, both requiring the employer to pay compensation and fixing the total amount of compensation payable to the employee. Mitchell v. The Etna, 138 F.2d 137 (3rd Cir. 1942); Roeben v. U. S., 113 F.Supp. 732 (D.C.N.J. 1953); Whyatt v. U. S., 92 F.Supp. 543 (S.D.N.Y. 1950). Under § 933 (b), as amended in 1938, the assignment of the third party claim took place upon acceptance of compensation after a formal order by the deputy commissioner awarding compensation. Any other action by the deputy commissioner lacking finality with respect to the compensation, such as a recommendation not binding upon the parties, was not sufficient to cause assignment of the third party claim to the employer. In Grasso v. Lorentzen, 56 F.Supp. 51 (S.D.N.Y. 1944), affirmed, 149 F.2d 127 2d Cir. 1945), Cert. denied, 326 U.S. 743,

rehearing denied 328 U.S. 870, the Court held that a memorandum entered by the deputy commissioner which recommended, but which did not require payment of compensation, did not constitute "an award in a compensation order" sufficient to work an assignment of the employee's claim.

Although the 1938 amendment did thus prevent the unwitting assignment of the third party claim by acceptance of voluntary compensation payments, it nonetheless still required the employee to file notice of his election to sue the third party. Upon such election, the employer then had the right to suspend compensation payments. Nacirema Operating Co. v. Andruzzi, 185 F.Supp. 344 (E.D.Pa. 1960).

The 1959 Amendment

In 1959, Congress once again amended § 933, both to completely eliminate the requirement that the employee make an

election between remedies and also to delay the automatic assignment of the third party claim until six months after the acceptance of compensation "under an award in a compensation order." Placing § 933 in its present form, the 1959 amendment changed subparts (a) and (b) to read as follows:

> "(a) If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.
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> (b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award." [Emphasis added.]

Following the 1959 amendment of the Section to the above, the decisions of the District Courts and Courts of Appeal

uniformly interpreted the amendment as expanding the rights of the injured employee, further protecting him against premature and unwitting surrender to his employer of his right to sue on his own behalf, by delaying the automatic assignment until six months after the entry of an award in a compensation order. Louviere v. Shell Oil Co., 509 F.2d 278 (5th Cir. 1975). With the exception of two recent decisions by the Fourth Circuit, relied upon by the Petitioner herein and discussed below, the cases within all circuits considering the question have held that § 933 (b) does not cause an assignment of the third party claim until six months after the entry of some order by the deputy commissioner or other agency of the U. S. Department of Labor, not only requiring that the employer pay compensation but also fixing the total amount of compensation payable to the employee under the Act. Ambrosino v. Transoceanic S.S. Co., 675 F.2d 470 (2nd Cir. 1982);

Vederame v. Torm Lines, 670 F.2d 5 (2nd Cir. 1982); Collier v. Mendis, Inc., 526 F.Supp. 459 (D.C.D.C. 1981); Fearson v. Johns-Manville Sales Corp., 525 F.Supp. 671 (D.C.D.C. 1981); Dunbar v. Retla S.S. Co., 484 F.Supp. 1308 (E.D.Pa. 1980); Seaquest Marine, Inc. v. Cove Shipping, Inc., 474 F.Supp. 164 (W.D.Wash. 1979); Rodriguez v. Compass Shipping Co., Ltd., 456 F.Supp. 1014 (S.D.N.Y. 1978), affirmed 617 F.2d 955 (2nd Cir. 1980).

It was clearly the intent of Congress, by the specific and unambiguous language placed in the statute, that no statutory assignment of the employee's claim can take place without the actual entry of an order by the Department of Labor awarding compensation benefits to the employee. In his concurring opinion in McClendon v. Charente S.S. Co., 348 F.2d 298 (5th Cir. 1965), Chief Judge John R. Brown made this clear in disposing of a contention that the 1959 amendment

(delaying assignment until six months after an award) was intended to restrict the employee's right to pursue his claim:

> "And as to a supposed protection to the employer-stevedore or the tortious third party shipowner it is of no real value as a built-in sometime available, prescriptive limitation. Except for death cases and in a few other rare injury situations cases under the Longshoremen's Act are processed frequently without formal claim and almost invariably without a final formal award by the deputy commissioner. Atlantic & Gulf Stevedores, Inc. v. Donovan, 5 Cir., 1960, 274 F.2d 794, 800; 279 F.2d 75. Of course only a final award triggers the six month period. Consequently as to most cases the tortious third party remains vulnerable until the appropriate State-Federal-Local-Marine Statute of Limitations or Laches cuts off the claims.
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> The 1959 amendment helps neither the distraught stevedore-employer or the harried third party in any predictable, meaningful regular way. This eliminates all save the injured worker as the object of congressional concern. As to him the purpose was to expand, not contract, his rights." [348 F.2d at 303-304. Emphasis added.]

The decision by the Sixth Circuit in the present case, Duris v. Erato Shipping, 684

F.2d 353 (6th Cir. 1982) is fully consistent with the foregoing decisions.

The Rodriquez Decision

Quite contrary to the urgings of the Petitioner herein, this Court's recent decision in Rodriguez v. Compass Shipping Co., Ltd., 451 U.S. 596 (1981) is fully consistent with the interpretation of § 933 (b) expressed by the foregoing cases. The question in that case was limited to the conclusiveness of the statutory assignment once, in fact, it had occurred. In deciding that question, this Court once again set out the history of § 933 from its origin, in much the same language as it had previously used in American Stevedores v. Porello, supra.[2]

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2. "As originally enacted in 1927, the Act gave an injured longshoreman the right to elect between the certain recovery of compensation from his employer without any proof of fault, or the less certain, but probably more

Then, fully consistent with the decision by the Sixth Circuit in the present case, this

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generous, remedy of an action for damages against a negligent third party. The employee's election to accept compensation under the Act effected and immediate assignment to his employer of his cause of action for negligence. Under the original Act, the longshoreman could pursue either remedy but not both, and nothing more than the acceptance of compensation was required to evidence the employee's election. See, e.g., Toomey v. Waterman S.S. Corp., 123 F2d 718, 721 (CA2 1941).

In 1938, Congress amended the Act to provide that the acceptance of compensation would operate as an assignment only if the payment was 'under an award in a compensation order filed by the deputy commissioner.' This procedural change was designed to protect the employee from the harsh consequences of an improvident election." [Rodriguez, 451 U.S. at 604, 605. Emphasis added, footnotes omitted.]

"In 1959, Congress acted to remedy the problems created by the potential conflict between the interests of the employer and the employee in prosecuting third party claims. Its solution was not to create or define an exception to the assignment by operation of law. Rather, Congress substantially adopted the central provisions of the Zelenko bill by amending § 33 (b) to postpone the assignment by operation of law until six months after the acceptance of compensation under an award . . . . " [Rodriguez, 451 U.S. at 610. Emphasis added, footnotes omitted.]

Court held that the unequivocal language of § 933 (b) required a plain and literal interpretation of its meaning:

> "In making this evaluation, however, we adhere to the rule that, '[a]bsent a clearly expressed legislative intention to the contrary, [the statutory] language must ordinarily be regarded as conclusive.' Consumer Product Safety Commission v T G E Sylvania, Inc. 447 US 102, 108." [451 U.S. at 604.]
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> The language of § 33 (b) is both mandatory and unequivocal. It provides that the acceptance of compensation under an award 'shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against third person unless such person shall commence an action against such third person within six months after such award.' 33 USC § 933 (b) (Emphasis supplied by Court)
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> The only conditions precedent to the statutory assignment are the acceptance of compensation pursuant to an award in a compensation order and the passage of the required period of six months. These conditions are admittedly satisfied in these cases." [451 US at 602, 603. Emphasis added, footnotes omitted.]

No part of the decision in Rodriguez or the interpretation of § 933 therein would warrant reversal of the present decision from

the Sixth Circuit. In fact, an examination of the facts before the Court in Rodriguez will reflect that it fully supports the Sixth Circuit decision in the present case. The opinion of the District Court in Rodriguez v. Compass Shipping Co., 456 F.Supp. 1014 (S.D.N.Y. 1978) reflects that the facts were that the Department of Labor had approved and ordered the payment of an agreed settlement of the employee's workman's compensation claim. In holding that the compensation order entered in enforcement of the settlement, fixing the total compensation payable to the employee, triggered the time running toward the statutory assignment, the District Court stated:

> "For, as the statute makes clear, mere acceptance of compensation, absent an 'award', does not effect a statutory assignment of the injured party's claim.[4]

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[4] The reverse was true before 1938. Until the statute was amended in that year, the simple acceptance of compensation did

> create an assignment of the claim. See American Stevedores, Inc. v. Porello, 330 U.S. 446, 454 n. 18, 67 S.Ct. 847, 91 L.Ed. 1011 (1946)." [456 F.Supp. at 1019. Emphasis supplied by Court.]
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> The ordering of compensation by a claims examiner or other delegee of the deputy commissioner, as well as by the deputy commissioner himself, fully satisfies the purpose of the award requirement, which is solely to insure the injured person an opportunity to consider fully the consequences under § 933 (b) of accepting compensation before those consequences are incurred." [456 F.2d at 1020. Emphasis added.]

Since 1976, the Department of Labor Regulations at 20 C.F.R. § 702.315 (a) require such settlement approvals to be in the form of a formal compensation order.

The Error of Liberty Mutual and Simmons

The Petitioner herein relies upon and urges this Court to accept the "logic" of decisions by the Fourth Circuit in Liberty Mutual Insurance Co. v. Ameta & Co., 564 F.2d 1097 (4th Cir. 1977), and Simmons v. Sea-Land Services, Inc., 676 F.2d 106 (4th Cir. 1982).

In those decisions, the Fourth Circuit stands alone in going beyond the expressed language of § 933 (b) to hold that an "award" can consist of the acceptance of voluntary compensation payments, coupled with the filing, by the employer, of report forms required by the Act in all cases. In those two decisions, we respectfully submit, the Fourth Circuit begins with a misconception and then takes it beyond its logical application.

The holding in Liberty Mutual v. Ameta, supra, was only that the compensation carrier was entitled to reimbursement of its compensation payments, where a recovery had already been made in a suit by the employee against the shipowner. The equities in that case clearly compelled a finding on some basis that the compensation carrier was entitled to reimbursement. The Fourth Circuit was apparently acting on the misconception that a finding of some sort of award was necessary

in order to accomplish this equitable result. The Court thus manufactured an award out of bits and pieces, since it thought that such was necessary to reach the intended result.

Quite obviously, a statutory assignment under § 933 (b) is not necessary upon those facts. The Fifth Circuit considered the same question and reached the same end result, without falling into that misconception and without creating an "award" by prestidigitation, in Louviere v. Shell Oil Co., 509 F.2d 278 (5th Cir. 1975). The employer or compensation carrier has an equitable right under General Maritime Law to recoupment of their compensation payments. In Federal Marine Terminals v. Burnside Shipping Co., 394 U.S. 404 (1969), this Court specifically held that the stevedoring company has a cause of action under General Maritime Law to recover this financial loss caused by a negligent shipowner, irrespective of the statutory assignment.

In Simmons, the Fourth Circuit then took that misconception beyond its logical application to hold that the injured longshoreman's action was assigned to his employer under § 933 (b) six months after the acceptance of voluntary compensation payments and the filing, by the employer, of report forms required under the Act. With the exception of Liberty Mutual, there is no support in any of the cases interpreting this Section since its origin for a holding that such can constitute "an award in a compensation order." The Fourth Circuit was apparently acting under a mistake in fact in assuming that the mandatory report forms, specifically LS-206 and LS-208, were filed by the deputy commissioner (which misconception the Petitioner seeks to perpetuate here). Such, of course, is not a factually correct statement of that which occurs upon the beginning or ending of voluntary compensation payments in any case. Section 914 (a)

requires the employer to promptly pay compensation "without an award" except where it contests its liability to pay compensation. Section 914 (c) then provides:

> "Upon making the first payment, and upon suspension of payments for any case, the employer shall immediately notify the deputy commissioner, in accordance with a form prescribed by the Secretary, that payment of compensation has begun or has been suspended, as the case may be." [Emphasis added.]

It is highly significant that the form prescribed by the Secretary for providing such notice (LS-206) and which was a crucial element used by the Fourth Circuit in constructing an award is labeled in bold letters: "PAYMENT OF COMPENSATION WITHOUT AWARD." The same notice form is present in the record herein. [Joint Appendix, p. 48]

The Fourth Circuit felt, for some reason, that such a broad reading of the section was necessary to protect the rights of the employer. However, the employer was not before the Court in that case, nor was it

seeking the assignment of the employee's claim. In so doing the Fourth Circuit stands by itself in this reading of the statute and was in error for a number of reasons. The first of those is that its decision ignores the basic proposition that the Longshoremen's and Harbor Workers' Compensation Act is to be liberally construed in favor of the injured employee. Voris v. Eikel, 346 U.S. 328 (1953); Pillsbury v. United Engineering Co., 342 U.S. 197 (1952); Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1980). "As we have long held, 'this Act must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results.'" Director, OWCP v. Perini North River Assoc., _____ U.S. _____, 74 L.Ed.2d 465 (1983).

Moreover, other sections of the statute treat very differently the employer's obligation for payment of compensation without an award, as opposed to its obligation for

payment of compensation under an award. For example, within § 914, subsection (b) requires payment of compensation without an award within fourteen days, whereas subsection (f) allows only ten days for payment of compensation under an award. Subsection (e) imposes a ten percent penalty on untimely payment of compensation without an award, whereas subsection (f) imposes a twenty percent penalty for nonpayment of compensation owed under an award.

Further, Simmons overlooks the fact that § 919, establishing procedure in respect of claims, specifically defined the term "award in a compensation order" for the purposes of the Act:

> "(e) The order rejecting the claim or making the award (referred to in this Act as a compensation order) shall be filed in the office of the deputy commissioner, and a copy thereof shall be sent by registered mail or by certified mail to the claimant and to the employer at the last known address of each."

Of course, the "award" created by Simmons fails to meet such definition.

Finally, the Fourth Circuit in Simmons ignored the many recent mandates by this Court that, in interpreting such statutes, its " . . . task is to give effect to the will of Congress, and where its language has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive . . . . " Griffin v. Oceanic Contractors, Inc., _____ U.S. _____, 73 L.Ed.2d 973 (1982); Bloomer v. Liberty Mutual Insurance Co., 445 U.S. 74 (1980); Potomac Electric Power Co. v. Director, Workers' Compensation Programs, 449 U.S. 268 (1980); Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256 (1979); Rodriguez v. Compass Shipping Co., 441 U.S. 596 (1981); Director, OWCP v. Perini North River Associates, _____ U.S. _____, 74 L.Ed.2d 465 (1983). The language selected by Congress in the 1959 amendment to § 933 (b) is clear and

unequivocal. The assignment of the third party claim to the employer takes place only six months after acceptance of compensation "under an award in a compensation order." Section 919 (e) defines those words. The Fourth Circuit in Simmons has gone beyond the language of the statute to create an "award in a compensation order" where none in fact exists.

The Fourth Circuit decision in Simmons has not been followed by any other Circuit within the federal judiciary. Rather, it has been consistently criticized. See, for example, Rother v. Interstate & Ocean Transport Co., 540 F.Supp. 447 (E.D.Pa. 1982), where the facts were vertually identical to those in Simmons as well as those in the present case. Compensation had been paid for a period of time. The insurance carrier had filed the report forms required by the Act. Compensation payments were suspended when the Plaintiff had returned to work. The

Defendant contended that there had been an assignment of the third party claim to the Plaintiff's employer under § 933 (b). The Court specifically declined to follow Simmons, holding that Rodriguez required the entry of some type of order for payment of compensation by the Department of Labor before such assignment could take place. In analyzing the question, the Court stated:

> "In Rodriguez v. Compass Shipping Co., . . . , the Second Circuit held that a settlement agreement embodied in a DOL Form, executed after an informal conference between the employee, employer and claims examiner and signed by all three parties was a compensation "order" for purposes of statutory assignment. Accord, Theodore v. Moore-McCormack Lines, Inc., . . . ; See, Ambrosino v. Transoceanic S.S. Co., . . . ; Vederame v. Torm Lines, ... But the Supreme Court, in reviewing that decision explicitly only assumed, and declined to decide that the Second Circuit was correct. Rodriguez, Supra, ... Moreover, the documents filed here by USS differ markedly from a settlement agreement endorsed by the DOL following an informal conference.
>
> To hold that voluntary acceptance of some compensation is tantamount to an award of benefits where the total amount of compensation remains contested on the

record would misconstrue the statute." [540 F.Supp. at 484, 485. Citations omitted.]

See also Kirsch v. Bangladesh Shipping Corp., 544 F.Supp. 83 (E.D.Pa. 1982). In a very recent decision, the Southern District of Alabama likewise rejected Simmons. In Howell v. Ocean Transport Co., Inc., _____ F.Supp. _____ (S.D.Ala. Dec. 2, 1982), that Court stated:

> "No amount of alchemy can transmogrify a voluntary payment into a 'award in a compensation order filed by the deputy commissioner or Board . . . . ' The opinion of the Court of Appeals for the Fourth Circuit in Simmons is simply squarely contrary to the express statutory language."

The New York State Court, Appellate Division is in accord; Gray v. Rederi A/S Myren, _____ N.Y.Supp. _____ (N.Y.Law J., Aug. 26, 1982).

Perhaps the most recent decision on this question is that in Hall v. International Union Lines, Inc., 552 F.Supp. 816 (E.D.La.

1982), wherein the District Court discusses the error of Simmons at length:

> "Other circuits, including post-Rodriguez decisions, have flatly rejected Fourth Circuit jurisprudence and have ruled that the mere acceptance of benefits, even when combined with the required verification forms, does not constitute 'acceptance under an award in a compensation order formed by the deputy commissioner.' [Citing cases discussed herein.] This line of authority is based upon the time honored judicial maximum giving conclusive effect to the express terms of the Act. See Consumer Product Safety Commission v. GTE, 447 U.S. 102, 100 S.Ct. 2051, 64 L.Ed.2d 766 (1980). In this case, the critical statutory language is: '[a]n acceptance of such compensation under an award in a compensation order filed by the deputy commissioner . . . . ' In relying solely upon acceptance of compensation for triggering the statutory assignment, Simmons and its progeny effectively read 'under an award in a compensation order filed by the deputy commissioner' out of the Act. Such a construction, however, defies the intent of Congress when it amended the Act in 1938 to include this very language. . . . . The change was obviously designed to benefit the employee. It is unlikely that a dependent longshoreman will knowingly repudiate substantial compensation benefits. His acceptance, however, of these uncontested payments may be in ignorance of the total benefits he is entitled to collect, the seriousness of his injury, and the legal consequences of his electing to accept

compensation. . . . . The entry of an award by the deputy commissioner, or his authorized representative, fixes the total amount of compensation due and 'puts the longshoreman on notice that he has six months within which to exercise his third-party recovery.'" [552 F.Supp. at 818.]

"In this case, the filing of the employer's notice concerning the initiation of compensation is not a compensation order. The document speaks for itself. The standard form is entitled 'Payment of Compensation Without Award,' and it is submitted without any affirmative action by the deputy commissioner. . . . . The employee, therefore, has no guarantee of a total award under this document. The form simply verifies that the employer has commenced compensation benefits without an award. 33 U.S.C. § 914 (c). Such voluntary payments are in fact mandatory unless the employer contests liability under the Act. 33 U.S.C. § 914 (a). . . . . Thus, the Act distinguishes between so-called voluntary compensation payments and payments made pursuant to an award in a compensation order entered by the deputy commissioner. The documents and evidence submitted on this motion clearly demonstrate that compensation was paid without an order or award by the deputy commissioner. In the absence of such an award or order, Plaintiff's acceptance of compensation does not activate the statutory assignment provision of the Act." [552 F.Supp. at 819.]

Even the Maryland Court of Special Appeals (which is within the Fourth Circuit)

has rejected Simmons in Spoto v. Washington Metropolitan Area Transit, 52 Md.App. 424 (1982). There, the Maryland Court of Special Appeals was correct in its description of the plain language of § 933 (b):

> "As we note from the simple, direct language of § 33 (b) quoted above, it was encumbent upon the Defendants to show more than the payment and acceptance of workers' compensation payments. Only acceptance of such compensation
>
> - Under an award
> - In a compensation order
> - Filed by the deputy commissioner or . . . Board
>
> triggers an assignment to the employer, unless the person entitled to compensation commences an action 'within six months after such award.' (Emphasis added.)" [52 Md.App. at 426]

It is respectfully urged that this Court give the same meaning to the plain wording of the statute.

Protecting the Interests of the Employer

The Petitioner herein will no doubt urge this Court to read the statute differently,

"in order to protect the interests of the stevedoring company-employer." However, one must ask why then is the stevedoring company-employer not a party to this case. It is glaringly obvious that the employer herein is not before this Court seeking an order assigning its employee's third party claim.

The stevedoring companies definitely do not want an early, automatic assignment of the third party claim in all cases. As the Sixth Circuit clearly pointed out (not as a reason for declaring void an assignment mandated by the language of the statute) the stevedoring company will rarely desire to sue its valued business customer to recoup compensation paid to its own injured employee. In almost all cases, the stevedoring company would much rather have the injured employee bring his own action. In the event of success in such action by the employee, the stevedoring company is clearly entitled to recoupment of all of its compensation and

medical expenses, under Bloomer v. Liberty Mutual Insurance Co., 445 U.S. 74 (1980); thus permitting the stevedoring company to have its cake and eat it too.

In the unusual case in which the stevedoring company desires to bring the suit and the employee fails to do so after voluntary compensation payments, the stevedoring company clearly has a remedy. If an assignment under § 933 (b) was felt necessary, the employer could apply for and receive an award fixing its total compensation liability, thus triggering the assignment provision. American Stevedores v. Porello, 330 U.S. 446 (1946). Of course, a statutory assignment of the third party claim is not necessary, since the employer has a cause of action under General Maritime Law for its financial losses caused by a negligent shipowner. Federal Marine Terminals v. Burnside Shipping Co., 394 U.S. 404 (1969); Louviere v. Shell Oil Co., 509 F.2d 278 (5th Cir. 1975).

The Burnside decision survives the 1972 amendments to the Longshoremen's Act, as discussed in the very recent decision by the Ninth Circuit in Crescent Wharf & Warehouse Co. v. Barracuda Tanker Corp., 696 F.2d 703 (1983). The question in the case was whether the stevedoring-employer, without an assignment under § 933, had the right to pursue the third party claim. Addressing that issue, the Court stated:

> "The short answer to issue 2 is 'Yes.' The Supreme Court held in Federal Marine Terminals, Inc. v. Burnside Shipping Co., 394 U.S. 404 (1969), that a Plaintiff standing in the position of Crescent Wharf could recover from the vessel's owners the amount of compensation payments occasioned by the owners' negligence. Burnside controls here.
>
> The Owners strenuously contend that Crescent Wharf's Burnside action for indemnity was abrogated by the 1972 amendments to the LHWCA. The Owners correctly claim that two mainstays of Burnside, Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956), and Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946), were expressly overruled by the 1972 amendments. Such overruling, however, is not the end of our inquiry.

> The legislative history of the 1972 amendments shows that Congress intended the elimination of the Ryan and Sieracki type of causes of action. However, no mention was made of the Burnside type of a cause of action.
>
> The Supreme Court said in Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 266-67 (1979) (addressing question of whether 1972 amendments to LHWCA altered shipowner liability): 'This silence is most eloquent, for such reticence while contemplating an important and controversial change in existing law is unlikely.'" [696 F.2d at 706.]

Thus, the assertion by the Petitioner herein and the shipowners' amicus, that there must be an award of compensation in all cases under the Act in order to protect the interests of the employer, is not based upon fact or law. The only parties who "must" have an award in all cases under the Act are the shipowners, who thereby seek to impose an agonizingly short statute of limitations on the party most likely to assert a cause of action against them: the injured longshoreman.

The Tragedy of a Six Month Limitation

As a final thought, this Court should not act under the misapprehension that a reversal of the Sixth Circuit in the present action and the endorsement of Simmons would result in the elimination of many third party claims by injured longshoremen, thus reducing the docket load of the courts. Since § 914 requires the first payment of compensation to be made within fourteen days of injury, the result of Simmons would leave the injured longshoreman with only six months and fourteen days from the date of his injury, within which to file suit on his claim. Faced with such an amazingly short limitations period, any attorney representing an injured longshoreman would be required to file suit immediately upon being retained. Thus, the Courts would be flooded with suits which had to be filed without any reasonable opportunity for investigation into the question of whether the shipowner was negligent, or

without any opportunity to weigh the question of whether the economic impact of the longshoreman's injury would warrant pursuit of the third party claim.

The unfortunate result of such a brief and unpredictable limitation of action would thus be to place in Court many claims without merit, and cause many meritorious third party claims to be lost unwittingly by the injured longshoreman who thought he had three years to bring his suit under 46 U.S.C. § 763a.

CONCLUSION

The shipowners and their counsel are indeed ingenious. They here seek to take a novel theory from an unusual case and stretch it to apply to all others. The theory accepted by the Fourth Circuit in Liberty Mutual was then indeed novel, but perhaps suited to the equities of the peculiar facts in that unusual case. In such a limited fact situation, it worked no restriction on the rights

of the injured longshoreman. However, when applied to the facts most normally found in the employee's third party claim, such interpretation of § 933 strays far from the intended purposes of the Longshoremen's and Harbor Workers' Compensation Act.

The entire history of § 933 from its origin, and the case law interpreting this section including this Court's decision in Rodriguez, compel this Court to read the language of the statute to mean exactly what it says. The shipowner should not be permitted to create by slight of hand an "award" where none exists.

We respectfully suggest that the decision of the Sixth Circuit herein is imminently correct and should be affirmed.

Respectfully submitted on
behalf of the Association of
Trial Lawyers of America,
Howard A. Specter, President,
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No. 82-502

In the
Supreme Court of the United States
October Term, 1982

PALLAS SHIPPING AGENCY, LTD.,
Petitioner,

vs.

JOSEPH DURIS,
Respondent.

PROOF OF SERVICE

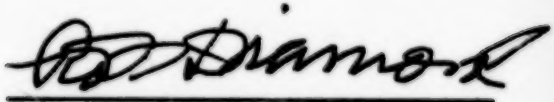
I, Ross M. Diamond III, one of the attorneys for Association of Trial Lawyers of America, amicus curiae herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 2nd day of March, 1983, I served copies of the foregoing brief amicus curiae in support of Joseph Duris, Respondent, on the several parties thereto, as follows:

1. On Pallas Shipping Agency, Ltd., Petitioner, by mailing copies in a duly addressed envelope, with first class postage prepaid, to its attorney of record as follows:

Lucian Y. Ray
Attorney for Petitioner
1050 Union Commerce Building
Cleveland, Ohio 44115

2. On Joseph Duris, Respondent, by mailing ocpies in a duly addressed envelope, with first class postage prepaid, to his attorney of record, as follows:

Frank W. Cubbon, Jr.
Attorney for Respondent
335 North Superior Street
Toledo, Ohio 43604



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ATTORNEYS AT LAW

Cleveland, Ohio 44115
January 10, 1983

Mr. Michael S. Starr
Director of Research and Legal Dept.
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1050 31st Street N.W.
Washington, D.C. 20007-4499

PALLAS SHIPPING AGENCY, LTD. v. JOSEPH DURIS
IN THE SUPREME COURT OF THE UNITED STATES
CASE NO. 82-502 - Our File 681RCD

Dear Mr. Starr:

We wish to acknowledge receipt of Thomas W. Gallagher, Esq.'s letter of January 7, 1983, in which you seek our consent to file a Brief Amici Curiae on behalf of the Association of Trial Lawyers of America in support of the Respondent.

On behalf of the Petitioner, Pallas Shipping Agency, Ltd., we hereby grant the required consent pursuant to Rule 36 of the Rules of the United States Supreme Court.

Yours very truly,

RAY, ROBINSON, HANNINEN & CARLE

By W. H. Carle

cc: Ross H. Diamond III, Esq.
Thomas W. Gallagher, Esq.

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January 7, 1983

Michael S. Starr,
The Association of Trial Lawyers of America
1050 31st Street, NW
Washington, D.C. 20007-4499

RE: Case Number: 82-502 in the
Supreme Court of the United States
October Term, 1982
Pallas Shipping Agency, Ltd.,
Petitioner,
vs.
Joseph Duris,
Respondent

Dear Mr. Starr:

We are in receipt of and wish to acknowledge your letter of January 3, 1983, in which you seek permission to file a Brief Amici Curiae in the aforementioned case, on behalf of the Association of Trial Lawyers of America.

On behalf of the respondent, Joseph Duris, we hereby grant our consent and look forward to your participation in this action.

Yours very truly,

Thomas W. Gallagher

TWG:mw

cc: Ross Diamond, Esquire

PETITION FILED
MAR 2, 1983

NO. 82-502
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

PALLAS SHIPPING AGENCY, LTD.,
Petitioner,

-against-

JOSEPH DURIS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE and BRIEF AMICI CURIAE IN SUPPORT OF RESPONDENT ON BEHALF OF Local 1291, Local 1694, Local 1566, Local 1884, Local 1332, Local 1242, and Local 1883, International Longshoremen's Association, AFL-CIO

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

PALLAS SHIPPING AGENCY, LTD.,

Petitioner,

-against-

JOSEPH DURIS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States

Local 1291, Local 1694, Local 1566, Local 1884, Local 1332, Local 1242 and

Local 1883, International Longshoremen's Association, AFL-CIO, respectfully move the Court for leave to file a Brief Amici Curiae in support of Respondent in the within matter, and in support thereof state as follows:

1. Movants are local unions representing longshoremen employed in the Port of Greater Philadelphia, which encompasses the ports of Philadelphia, Pennsylvania, Camden, New Jersey, and Wilmington, Delaware. Movants' members will be adversely affected if the decision of the United States Court of Appeals for the Sixth Circuit in the instant case is reversed, and, therefore, seek to file this Brief Amici Curiae in support of respondent.

2. Counsel for respondent has advised that he does not oppose the granting of this motion. However, counsel for petitioner had advised that

he does oppose the granting of this motion.

3. Movants believe that there are not less than thirty pending law suits brought by movants' members which will be affected by this Court's decision in the instant case, in addition to future law suits which may be brought by movants' members.

4. Movants desire to file a Brief Amici Curiae in support of respondent in this matter in order to place before the Court the deposition testimony of John J. McTaggart, Deputy Commissioner for the Third Compensation District for the United States Department of Labor, who is charged with administering the Longshoremen's and Harbor Workers' Compensation Act in the States of Pennsylvania, Delaware and West Virginia. Mr. McTaggart's deposition was taken in litigation which

involved the same issue presented by the instant case and sets forth in detail the procedures followed by the United States Department of Labor insofar as they relate to the issues involved in the instant case.

5. More specifically, Mr. McTaggart's deposition establishes that the Department of Labor has procedures available under which a stevedore employer who may desire the entry of a formal compensation award, may obtain such an award on request without stopping the payment of compensation benefits to an injured longshoreman.

6. In addition, in his deposition, Mr. McTaggart discusses the application of certain penalty provisions contained in the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§914(e) and (f), and demonstrates that the interpretation of the statutory term payment of compensation "without an award" as

being the payment of compensation "under an award" would have disastrous consequences for the stevedoring industry.

7. Counsel for movants has reviewed the briefs of petitioner and amici curiae thus far filed in this case, and represent to the Court that they do not contain adequate factual information with respect to the foregoing points which, it is believed, are crucial to this Court's determination of the issues presented by this case.

8. The proposed Brief Amici Curiae and the deposition of Mr. John J. McTaggart are submitted herewith.

WHEREFORE, movants pray the Court to grant leave to file the within Brief Amici Curiae.

Respectfully submitted,

Charles Sovel
Counsel for Amici Curiae

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BRIEF AMICI CURIAE

SUMMARY OF ARGUMENT

1. An employer desiring the entry of an "award in a compensation order" for purposes of commencing the running of the six month period prerequisite to a statuory assignment under 33 U.S.C. §933(b) may obtain such an award upon request to the office of the Deputy Commissioner for the appropriate compensation district. It is not necessary for the employer to refuse or terminate the payment of benefits in order to obtain such an order. Rather, all that an employer desiring the entry of a formal compensation order need do is to file a Notice of Controversion while continuing to pay compensation benefits, following which an order can be entered by the Deputy Commissioner on an agreed statement of facts without the necessity

of a formal hearing or delay in the payment of benefits.

2. Treating the payment of compensation "without an award" as if it were payment of compensation "under an award in a compensation order" would have disastrous consequences for the stevedoring industry and other employers required to pay compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act. The Longshoremen's and Harbor Workers' Compensation Act contains specific provisions imposing penalties on employers where compensation benefits are not paid when due, see 33 U.S.C. §§ 914 (e) and (f). Where compensation is being paid "without an award", and the payment of compensation benefits is terminated by the employer, and, subsequently, it is determined that the payment of benefits should not have been terminated, then,

under Section 14(e) of the Act, 33 U.S.C. §914(e), the employer is subject to a 10% penalty on the payments which were withheld, but this penalty is not imposed where a notice of controversion has been filed by the employer, or the failure to pay was due to conditions beyond the employer's control. However, where compensation is payable under the terms of "an award in a compensation order", and payment is not made when due, and it is later determined that compensation should have been paid, then, under Section 14(f) of the Act, 33 U.S.C. §914(f), there is imposed an additional penalty of 20% of the amount of compensation due and this penalty is not waivable.

An employer paying compensation "without an award" who believes that compensation no longer is due, either

because of the absence of medical evidence of disability, or because an examining physician has determined that the employee is able to return to work, may terminate the payment of compensation benefits and file a Notice of Controversion. In such circumstances, if it is later determined that the compensation benefits should have been paid, then no penalties are imposed on the employer. However, if under the same circumstances, compensation were being paid under "an award in a compensation order", the employer would be subject to the 20% penalties provided for in Section 14(f) of the Act, 33 U.S.C. §914 (f). The statutory language clearly contemplates a distinction between the payment of compensation "without an award" and the payment of compensation "under an award in a compensation order". Abolishment of this distinction, and the

treatment of the payment of all compensation as if it were payment "under an award in a compensation order" would create a nightmare for employers subject to the Act as any termination of the payment of benefits, even the termination of payments in the good faith belief that the employee no longer was entitled to benefits, would subject the employers to the risk of having to pay the 20% penalty provided in Section 14(f) of the Act.

3. The argument made in the Brief Amici Curiae in support of petitioner filed on behalf of various shipping companies to the effect that the filing of papers supporting the payment of compensation without an award should be regarded as the payment of compensation under an award in order to comply with Sections 19(b) and (c) of the Act, 33 U.S.C. §§919(b) and (c), is based on an

erroneous and misleading interpretation of the Act. The provisions of Section 19 of the Act do not apply to every claim for the payment of compensation benefits, but rather only apply in those instances where the right to receive compensation benefits is controverted by the employer and the employer is refusing to pay. Moreover, Section 19 applies only to those situations where a claim has been referred to an Administrative Law Judge. Counsel for the Amici Curiae have overlooked in their brief that the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act amended Section 19 by adding the provision now identified as Section 19(d) of the Act, 33 U.S.C. §919(d), which transferred the functions of the Deputy Commissioner under that section to hearing examiners (Administrative Law Judges) hearing disputed claims. Contrary

to the argument being advanced by the shipowners in their Amici Curiae Brief, Section 19 of the Act does not require the entry of an award in every case.

POINT I

AN EMPLOYER PAYING COMPENSATION BENEFITS MAY OBTAIN THE ENTRY OF AN AWARD UPON REQUEST WITHOUT HAVING TO TERMINATE THE PAYMENT OF BENEFITS.

The contention that the payment of compensation without an award should be treated as the payment of compensation "under an award in a compensation order" so as to trigger the running of the six month period for a statutory assignment under Section 33(b) of the Act, 33 U.S.C. §933(b), was first raised in Liberty Mutual Insurance Company v. Ameta & Co., 564 F.2d 1097 (4th Cir. 1977). There the Court, apparently without being aware of the procedures available under the Act, assumed that the only way that the entry

of a formal order could be obtained would be by the employer terminating the payment of compensation benefits and forcing the matter to a formal hearing. Thus, in holding that the payment of compensation without an award, accompanied by the filing of the appropriate documents evidencing such payment, could be treated as the payment of compensation under an award, the Court stated, 564 F.2d at 1103:

> "We hold that the documents set forth in footnote 10 above constituted sufficient affirmative action and a determination by the deputy commissioner granting benefits to Melson so as to constitute an 'award' of benefits in a compensation order under 33 U.S.C. §933(b) without the entry of a formal award. . . .
>
> "We believe this result is a logical one. A stevedore-employer should not be required to controvert every claim for compensation under the Act simply to insure the entry of a formal award in order to preserve the statutory

> "assignment and subrogation rights of the stevedore-employer and insurance carrier under 33 U.S.C. §§933(b) and (h). Such a requirement would frustrate the Act's time-honored purpose which was to eliminate the delay and expense incident to litigation, Wheeling Corrugating Co. v. McManigal, 41 F.2d 593, 595 (4th Cir. 1930), and cripple the congressionally explicit goal of prompt payment of claims that need not be controverted by employers."

This erroneous assumption that the entry of a formal compensation order could be obtained only by terminating the payment of benefits and bringing the matter to a formal hearing was carried through by the Fourth Circuit in its decision in Simmons v. Sea-Land Services, Inc.,676 F.2d 106 (4th Cir. 1982). There, in adopting a rule that the payment of compensation without award, coupled with the filing of a notice by the Deputy Commissioner that payments have been initiated, and the longshoreman's

acceptance of the payments, triggered the running of the six month period under Section 33, the Fourth Circuit stated, 676 F. 2d at 109:

> "We believe that this rule will foster the prompt payment of benefits by eliminating the need for perfunctory contravention by the employer, and will provide the employer with access to its remedies within a reasonable time." (Emphasis supplied)

This assumption that an employer can obtain the entry of a formal compensation award only by withholding payments and bringing the matter to a formal hearing is incorrect. On the contrary, there are procedures available under the Act by which an employer desiring a formal award can obtain its entry upon request without terminating the payment of compensation benefits. It was in order to place this procedure of record in another case in which the same argument

presented by the instant case was raised that the attached deposition of Mr. John J. McTaggart, Deputy Commissioner of Labor, initially was taken. In this deposition, Mr. McTaggart explans in detail the various procedures governing the administration of the Act and the various documents that are filed with the Department of Labor. In the course of the deposition, Mr. McTaggart was asked specifically whether an employer could commence the voluntary payment of compensation, file the form 206 evidencing the payment of compensation without an award, and then obtain the entry of an award (24a-25a).* Mr. McTaggart replied that such a procedure was available and that an order could be entered upon

* References are to pages in Mr. McTaggart's deposition which is attached hereto.

request simply by the filing of a Stipulation of Facts setting forth the terms under which compensation was being paid (25a-26a).

Indeed, the Regulations promulgated by the Department of Labor governing the administration of the Longshoremen's and Harbor Workers' Compensation Act specifically provide for the entry of such orders upon request. Thus, 20 C.F.R. 702.315(a) specifically provides:

> "(a) Following an informal conference at which agreement is reached on all issues, the deputy commissioner shall, within ten days after conclusion of the conference, embody the agreement in a memorandum or within thirty days issue a formal compensation order, to be filed and mailed in accordance with Section 702.349. If either party requests that a formal compensation order be issued the deputy commissioner shall, within 30 days of such request, prepare, file and serve such order in accordance with Section 702.349. . . ." (Emphasis supplied)

It is thus apparent that the decisions in Ameta and Simmons, supra, are based on an erroneous understanding of the procedures available under the Act. It is also clear that an employer's desire to obtain the entry of a formal compensation order for purposes of 33 U.S.C. §933(b) would not impede the timely payment of compensation benefits to an injured employee.

POINT II

MAINTENANCE OF THE DISTINCTION BETWEEN PAYMENT OF COMPENSATION WITHOUT AN AWARD AND PAYMENT OF COMPENSATION UNDER AN AWARD IS ESSENTIAL TO THE ADMINISTRATION OF THE ACT'S PROVISIONS DEALING WITH THE IMPOSITION OF PENALTIES WHERE THE PAYMENT OF BENEFITS HAVE BEEN WITHHELD.

As previously noted, the principal argument raised in support of the contention that the payment of compensation "without an award" should be treated as

the payment of compensation "under an award in a compensation order" is that such an interpretation is necessary as an incentive to employers to pay compensation benefits promptly. This argument is disingenuous. There is absolutely no history whatsoever under the Act of employers withholding the payment of compensation benefits in order to obtain a statutory assignment of the employee's third-party cause of action. Indeed, the number of suits that have been brought where there has been an assignment probably can be counted on the fingers on one hand with several fingers left over.* The incentive for the prompt

*The only reported case where an employer exercised the right to bring suit would appear to be Federal Marine Terminals, Inc. v. Burnside Shipping Co., 394 U.S. 404 (1964).

payment of compensation benefits lies in the Act's provisions for the imposition of penalties on employers who withhold the payment of benefits. These penalties are severe and there is no need to create any incentives on the employers other than those contemplated and enacted by Congress.

The penalty provisions appear in Sections 14(e) and (f) of the Act, 33 U.S.C. §§914(e) and (f). In these sections, the Act makes a distinction between the withholding of payment of benefits where compensation is being paid "without an award" and the withholding of benefits due under the terms of "an award". Section 14(e), 33 U.S.C. §914(e), deals with the payment of benefits "without an award" and provides as follows:

> "(e) If any installment of compensation payable without

> "an award is not paid within fourteen days after it becomes due, as provided in subdivision (b) of this section, there shall be added to such unpaid installment an amount equal to 10 percentum thereof which shall be paid at the same time as, but in addition to, such installment unless notice is filed under subdivision (d) of this section, or unless such non-payment is excused by the deputy commissioner after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment."
>
> Section 14(f), 33 U.S.C. §914(f)

covers the situation where the compensation was payable "under the terms of an award", and provides as follows:

> "(f) If any compensation, payable under the terms of an award, is not paid within ten days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20 percentum thereof, which shall be paid at the same time as, but in addition to, such compensation, unless review

> "of the compensation order making such award is had as provided in section 21 and an Order staying payments has been issued by the Board or court."

It can be seen that there are two major distinctions between Section 14(e) and Section 14(f). First, the penalty for the failure to pay compensation where it is being paid without an award is 10% while the penalty for the failure to pay compensation due under the terms of an award is 20%. Secondly, and more important, the imposition of the 10% penalty under Section 14(e) can be avoided by the filing of a Notice of Controversion under Section 14(d) of the Act, or can be waived by the Deputy Commissioner. The 20% penalty imposed by Section 14(f) for compensation due under an award can be avoided only by obtaining a stay issued by the Benefits Review Board or a Court while a matter is on

appeal. It is otherwise mandatory and nonwaivable.

The distinction between these two penalty provisions is discussed at length in Mr. McTaggart's deposition submitted herewith (18a-22a). In practical application, an employer who is paying compensation benefits to an employee normally would want to do so without an award. If the employer were to determine that compensation benefits should be terminated, for example by reason of the absence of medical evidence of disability, or because the employer's examining physician has determined that the employee is able to return to work, the employer simply files a Notice of Controversion and ceases the payment of benefits. If it is subsequently determined that benefits should not have been

terminated, the employer can pay the benefits up to date without penalty. However, if compensation were being made pursuant to an award, an employer seeking to terminate the payment of benefits for the same reasons, i.e., -- absence of evidence of disability or a report that the employee is able to return to work,-- would have to risk the imposition of the 20% penalty under Section 14(f) if the payment of benefits were discontinued.

Converting the payment of compensation without award into the payment of compensation under an award, which is the consequence of the position being argued by the shipowners, would have a disastrous effect on the employers who are paying compensation benefits, for then, in every case where the payment of benefits is discontinued, even in the good faith belief that such payments no

longer were due, the employer would be subject to the imposition of a 20% penalty which would not be waivable, should it later be determined that the employer erred in terminating the payment of benefits. In order to avoid such a consequence, the employers then would be compelled to file petitions with the Benefit Review Board for leave to terminate the payment of compensation in cases which were not even before the Benefits Review Board or an Administrative Law Judge. The paper work, expense and inconvenience that this would cause, in addition to frequent overpayment of benefits to employees, would cause incalculable damage to the employers covered by the Act and seriously impair the administration of the Act by the Department of Labor. When one realizes

the consequences to the employers of the position being argued by the shipowners, it is not surprising that no group representing the employers has come forward to assert the claim that they need a statutory assignment at an early date in order to press third-party claims on behalf of injured employees.

POINT III

SECTION 10 OF THE ACT, 33 U.S.C. §919 DOES NOT REQUIRE THE FILING OF A FORMAL COMPENSATION ORDER IN EVERY CASE, AND THERE IS NO ADMINISTRATIVE NECESSITY FOR TREATING THE PAYMENT OF COMPENSATION PAID WITHOUT AN AWARD AS IF IT WERE COMPENSATION BEING PAID UNDER AN AWARD

In the Amici Curiae Brief filed on behalf of various shipowners, the statement is made that §§919(b) and (c) of the Act, 33 U.S.C. §919(b) and (c), require the filing of a compensation order by the Deputy Commissioner in <u>every</u> case. The argument is then made that the

filing of the papers incident to the payment of compensation without an award should be treated as a compensation award for purposes of complying with §§19(b) and (c). This argument constitutes a gross misreading of the statute. First, the procedures set forth in §§19(b) and (c) apply only to those situations where the obligation to pay compensation is contested and a hearing must be held. Secondly, and more importantly, the 1972 Amendments to the Act transferred the functions of the deputy commissioner under §§19(b) and (c) to the hearing examiner (Administrative Law Judge) hearing a disputed claim. As a result, §§19(b) and (c) no longer apply to the office of the deputy commissioner. This is made clear by §19(d), which was added to the Act as

part of the 1972 Amendments, and which provides as follows:

> "(d) Notwithstanding any other provision of this Act, any hearing held under the Act shall be conducted in accordance with the provisions of Section 554 of title 5 of the United States Code. Any such hearing shall be conducted by a hearing examined qualified under section 3105 of that title. All powers, duties and responsibilities vested by this Act, on the date of enactment of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, in the deputy commissioner with respect to such hearings shall be vested in such hearing examiners." (Emphasis supplied)

CONCLUSION

The decision of the United States Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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Counsel for Amici Curiae

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

ALONZO CUMMINGS : CIVIL ACTION

vs.

YANGMING MARITIME : NO. 80-1269
TRANSPORT CORP.

Philadelphia, Pennsylvania,
Wednesday, July 1, 1981

Pretrial examination of JOHN J. McTAGGART, held in the offices of Freedman & Lorry, P.C., 8th Floor, Lafayette Building, at 10:10 a.m., on the above date before Janice M. Leaman, a Notary Public and Registered Professional Reporter.

APPEARANCES:

FREEDMAN & LORRY, P.C.
By: CHARLES SOVEL, ESQ.,
Attorney for Plaintiff

RAWLE & HENDERSON
By: CARL D. BUCHHOLZ, III, ESQ.,
Attorney for Defendant

(It is hereby stipulated and agreed by and between counsel that filing, signing, sealing and certification be waived; and that all objections, except as to the form of questions, be reserved until the time of trial.)

. . .JOHN J. McTAGGART, being first duly sworn, was examined and testified as follows:

BY MR. SOVEL:

Q. Mr. McTaggart, you are employed by the United States Department of Labor?

A. Yes.

Q. What is your title?

A. I am a claims examiner.

They call us assistant deputy commissioner, is my title.

Q. Are you specifically designated as an assistant deputy commissioner for a particular region?

A. No.

Not a region. A district. District 3, which comprises three states, Pennsylvania, West Virginia, and Delaware.

Q. As the assistant deputy commissioner for that district, what, in general, are your duties?

A. Well, we administer the longshoring act, the Longshoreman and Harborworkers Compensation Act.

We monitor claims. We get involved with disputed claims. All claims are processed through our office. We receive reports.

In general, we really monitor claims under the Longshore Act.

Q. In what district does New Jersey fall?

A. It is District 2.

Q. Where is that headquartered?

A. It is in New York City.

Q. Now, is there a procedure by which a claim can be transferred from one district to another?

A. Normally, yes, if an interested party requests the transfer.

The most common reason for the transfer is the claimant living in another area.

Q. Now, to clarify the record in this particular case, this case involves an accident that occurred in New Jersey.

That file was transferred at the claimant's request from the second district to the third district?
A. That is correct.
Q. Now, I would like to ask you a series of questions dealing with the procedures for handling claims under the Act. These questions are addressed to the general procedure for handling them, not what occurred in this specific case.

After we go through those general questions, I will ask you some questions about this particular case; do you understand that?
A. Yes.
Q. When an accident occurs which falls within the coverage of the Longshoreman's Act, what is the procedure that an employee follows to claim his compensation benefits?
A. All right. In a routine case I will try and explain what happens.

Normally, an injured employee is injured. He gives notice to his employer of the injury. The employer has notice. The employer has to provide treatment. The employer must authorize

free choice physician. The claimant is treated.

The employer has 10 days to file a first report of injury, which is a form 202. The employer will file this report giving the facts of the injury as they are related to them with the notice.

There are forms prescribed that an employee can give notice to the employer in writing. There is also another form prescribed that the employee can choose his own physician, and the employer would authorize the physician. The physician then is notified by the form to provide information back to the employer or insurance carrier so that they can start picking up the payments.

In a routine case, normally payments are made within 14 days.

Q. Now, when you are referring to payment made within 14 days, you are referring to a payment of Workmens Compensation benefits?

A. Right.

Q. That is a wage benefit?

A. Yes.

Q. Which is computed at two-thirds of the employee's average weekly rate?
A. That's correct.
Q. If that employer does not make that payment voluntarily, what procedure does the employee follow to obtain the payment of compensation benefits?
A. Well, the employee would file a claim, which is a form 203.

We would receive it, serve it on the employer. If there was additional information needed, such as medical evidence or what have you, we would request it prior to scheduling an informal conference. We would obtain the employer's position prior to the conference.

If there was still an impasse or dispute, we would then bring the parties in and try to resolve it through an informal proceeding.
Q. Let me stop you there.

When the employee files his Form 203, do you then transmit that to the employer?
A. Yes.
Q. Does the employer file what is, in effect, an answer to the 203?
A. Yes.

Q. Does that form have a number?
A. 215.

It is an LS 215, answer to employee's claim.

The answer to employee's claim is not a mandatory form with regard to any penalties.

Maybe I should backtrack. An employer who has knowledge of an injury must do one of two things within 14 days, either pay the claim or controvert it. If they are going to controvert the claimant's entitlement to compensation, they would file Form 207 which is a notice of controversion.
Q. Do you have with you a blank Form 207?
A. No, I don't.
Q. What does that form normally contain?
A. Well, it basically --

MR. BUCHHOLZ: Which form, 207?
BY MR. SOVEL:
Q. 207.
A. It basically contains -- it is, more or less, I like to use the term that, "We are not going to pay you, and here is the reason we are not."

It is a form that will specifically tell the reasons why the employer is controverting the claimant's entitlement. We will get a number of them just simply because the medical evidence has not been received to date or something like that.

Q. The reason given is no medical evidence?

A. Yes.

If they are going to raise a jurisdictional defense. So they really outline the reasons why they are not paying.

Q. To keep this in the logical order that I wish to for this deposition, if the employer has filed nothing, then the employee must file the Form 203, which is his claim for compensation benefits?

A. Correct.

Q. You forward that to the employer; is that correct?

A. Or responsible carrier.

Q. Or the carrier?

A. Yes.

Q. If it is an insured situation?

A. Yes.

Q. They may or may not file an answer to that form?
A. Yes.
Q. Is that correct?
A. We provide them with the forms. But there is no penalty if they don't.
Q. The form that you provide them with is the 215?
A. 215.
Q. If they still do not pay compensation benefits, what is the next step followed by your office?
A. We would schedule an informal conference.
Q. Before whom is the informal conference scheduled?
A. In my district, before myself or my claims examiner.

I have one claims examiner in Workmens Compensation.

Q. Working under you?
A. Yes.
Q. Is there a form that is issued following such a conference?
A. Yes.
Q. What is that form?
A. Well, they are called memorandum of informal conference.

It can be done on a formal or a narrative. It need not be -- we can do it by using the form of narrative. Mostly, we used to do narratives. But recently, due to the volume, we do use Form 280. And I do have a copy of Form 280. It is basically a memorandum of conference form. I hope I have Form 280.

MR. SOVEL: And may we have marked as a sample a blank Form 280 which is the form which is entitled memorandum of informal conference?

I ask that that be marked as P-1 of this date.

(Whereupon, a blank memorandum of informal conference form, was marked as Exhibit P-1 for identification.)

BY MR. SOVEL:

Q. Now, if following that conference the employer still declines to commence the payment of compensation benefits, what is the next step?

A. Well, the examiner or other person conducting the informal conference will, after getting development in the case -- normally, you need one informal confer-

ence in the case. You develop the case prior to scheduling it.

Once you get sufficient evidence, or when you feel the parties have reached a situation where they are not going to go any further, a recommendation is made. Pending the recommendation, we are given 14 days to respond, all the parties, to the recommendation, at which time if it is still at impasse or one party at interest will not comply with the recommendation, the moving party -- this is normally the claimant -- must request a formal hearing and submit what is called a prehearing statement or LSAT.

Q. With respect to that Form 280, the memorandum of informal conference, there is a space in that form where the person conducting the hearing makes a recommendation as to whether compensation should be paid or not paid, whatever may be --

A. Whatever the issue.

Q. Whatever the issue is. Then you allow the parties 14 days to determine if they will comply with that recommendation?

A. Yes.

Q. Then, if there is no compliance with the recommendation, it then becomes incumbent on the party seeking relief to request a further hearing?

A. Formal hearing.

Q. Is that correct?

A. That's correct.

Q. That is called a formal hearing?

A. Formal hearing.

Q. That is before an administrative law judge?

A. Yes.

Q. Now, at a hearing before an administrative law judge, evidence is taken, is it not?

A. Yes.

Q. Normally, the administrative law judges are dispatched from Washington?

A. The chief judge. Yes.

My referrals go to the chief judge in Washington, D.C., who assigns the administrative law judge to the case.

Q. As a result of the hearing before the administrative law judge, what decision, or what action, does he take?

A. Well, once he --

MR. BUCHHOLZ: Objection.

I am not sure there is any foundation here that John has personal knowledge of that.

BY MR. SOVEL:

Q. Are you familiar with the procedures before the administrative law judge?

A. Yes.

Q. Does the administrative law judge --

MR. BUCHHOLZ: Note my objection.

MR. SOVEL: Okay.

BY MR. SOVEL:

Q. -- issue decisions?

A. Yes.

Q. Does he issue awards?

MR. BUCHHOLZ: Objection.

A. He issues decisions and orders.

BY MR. SOVEL:

Q. What may be encompassed within a decision and order?

A. Well, the only -- it is -- the issues that we referred to are resolved by his hearing.

He makes a decision which is transmitted back to our office. Once we refer a case to the ALJ, it is out of our jurisdiction. We have to wait. We cannot act unless there was another

issue that we did not address. We could still have an informal conference even though a hearing is being conducted on another issue.

Q. Okay.

A. But once we transfer it out on those issues, the case is out of our hands. It is in the hands of the administrative law judge.

Once the administrative law judge holds his hearing and issues a decision and order, he sends the entire record back to my office. I am the custodian of the records. At that time I must then serve the order on the parties. Once I have received it -- and we try to get the order served within the same day it is received.

Q. Right.

A. Basically, we will prepare a certificate of filing and service and make service on all the interested parties.

At that point, this triggers the possible penalty provisions under Section 14E or F. I forget which letter it is. But the order must be complied

with once we file and serve it upon the parties within 10 days.

Q. What are the penalty provisions to which you are referring?

A. If they do not make payments within 10 days of the filing of an order, there is a 20 per cent in addition to the amount due and payable.

Q. 20 per cent additional payments in the payment they must make?

A. No.

Q. 20 per cent what?

A. The amount they have not paid in accordance with the order,

I want to add one thing: our filing triggers the appeal date. The interested parties in the case would have 30 days from the date of filing in our office -- in the office of the deputy commissioner to file their appeal with the Board.

Q. Now, going back in time in this procedure, if at any time before that order is filed by your office after the administrative law judge hearing -- if at any time the employer agrees to the payment of compensation benefits, what procedure is followed?

A. Well, if they voluntarily pay?
Q. Yes.
A. Well, if they didn't ask for an order, they would just simply voluntarily pay and file Form 206 showing the total payments.
Q. What is Form 206?
A. 206 is a form we use to provide to employers to advise us that compensations are being paid without award.

It has specific information such as the date of injury, when the date of disability began, the average weekly wage, the compensation rate, and the date of the first payment.
Q. Do you have a Form 206 with you?
A. Yes.

In fact, I have two. I have three.
Q. We are only going to have one marked.

MR. SOVEL: I will ask to have marked as P-2 a form of payment of compensation without award.

(Whereupon, a form of payment of compensation without award, was marked as Exhibit P-2 for identification.)

BY MR SOVEL:

Q. Who files this form?

A. Well, it is required that an employer or carrier, an authorized employer or carrier, provide it to us when they make their first payment.

There is also instructions on it that they are to send to the claimant, the injured employee who is disabled, a copy with the first payment.

Q. This form is entitled payment of compensation without an award.

What is the distinction, as you understand it, between this and payment of compensation with an award?

MR. BUCHHOLZ: Objection.

MR. SOVEL: Or under an award.

MR. BUCHHOLZ: Objection.

MR. SOVEL: You can answer.

A. Well, it is simply -- I don't know if it can be clearly stated. There is no award. There is no order to pay. There is no voluntary payment on the employer's part.

BY MR SOVEL:

Q. Okay.

A. With an award it is either an order by the deputy commissioner where he has

issued an award -- he can still issue awards, but he must have total agreement of the parties on all issues.

What we require in a case where I would be issuing an award would be a stipulation signed by the parties showing me the total agreement they have. We would also check that against the information in the case file, and then we will proceed to issue an award of compensation -- or, if an administrative law judge issued a decision and order.

Q. Do you have a form that is used for payment with or under an award?

A. No, we don't.

Q. How do you handle it?

A. Well, when I normally check it, I request employers when an award is issued, to submit a Form 206, which is a suspension notice, and modify it a bit, or just give me a narrative telling me the amounts they have paid and the date of payment.

Q. Then what do you issue?

A. Nothing.

We confirm that payments are being made. We would take action if payments were not being made.

Q. Now, if an employer pays compensation without an award and files the Form 206 and it desires to stop the payment of compensation because, as an example, it feels that the employee is no longer disabled, what procedure does it follow?

A. Well, I will go over that: basically, what they would do, or technically what they should do, is suspend payments, file Form 206 advising this that they have stopped payment, and also file Form 207, notice of controversion.

Q. If they follow that procedure, are they subject to a penalty for failure to pay compensation if it later is determined the employee was entitled to compensation?

A. Well, it would sort of be discretionary.

In other words, if they had a valid reason for suspending such as a failure to have medical evidence provided or what have you, we could excuse the -- the deputy commissioner could

excuse in a voluntary situation any penalty.

In other words, if the reasons for their controversion was the fact that they had not received medical evidence and they had paid the claimant for two months without medical evidence in the file and they suspended payments, and they were having difficulty -- or the claimant was not providing the medical evidence required -- and it worked out that this medical evidence came in later, naturally, we would excuse the failure to pay within the time frame.

Q. When you say excuse, you mean you would excuse the payment of penalties?

A. Yes.

Q. Now, if the compensation was being paid under an order or under an award and the employer ceased the payment of compensation for the same reason, didn't have medical information -- or just ceased the payment of compensation -- what would be the situation with respect to penalties?

A. Well, upon application, payments must be made within -- the first payment

within 10 days; and then, every 14 days thereafter.

If, under an award, the employer or carrier failed to provide that, by application of the claimant we would have to issue a 20 per cent penalty.

Q. There is no discretion to waive that penalty?

A. No.

I would have to investigate the claim. I could hold a hearing to determine the facts in the case that, in fact, the payments were not made.

Once I determined that, normally -- I think I have only done this once or twice -- the employer may admit this to me that they did not pay it within the time frame. If I had those facts that I could establish that, I would issue a default order.

Q. Am I correct that one of the distinctions between payment under an award and payment without an award is that if payment is improperly terminated when it is being made under an award, you have no discretion to waive the penalty provisions?

A. No.

Not when the facts indicate the payments were not made and the claimant applies for the --

Q. Penalties?

A. -- penalties.

Q. But the employer could stop for a valid reason if the payment was being made without an award?

A. Yes.

They can stop at any time, technically. They are always subjecting themselves to penalties.

There is really -- we couldn't enforce a 10 per cent penalty anyhow. We could recommend it.

Let's say we did recommend it at an informal conference that the employer pay a 10 per cent penalty and they declined to do it. And they paid all the compensation due the claimant. The claimant would still have to request a hearing and get a decision and order to start triggering the serving of the order, at which time, if they didn't comply with the ALJ's formal order to pay the penalty, we would have to go through the default procedure.

Q. Now, if an employer wanted to have payments made under a award, wanted to have an order or an award issued without, however, stopping the payment of compensation benefits himself -- or the employer stopping himself -- how would he go about getting an award issued?
A. Well, he would request it.

Basically, he would have to provide to us -- I insist on a stipulation of facts of the interested parties at which time we would go over the information in the case file.

If all the stipulations are accurate, we would issue an order, an award of compensation. But we must have a stipulation signed by all the interested parties.

Q. Now, does the filing of a Form 206, a payment of compensation without award, bind the employer to indefinitely continue the payment of compensation benefits?
A. No.
Q. Does it bind him to petition to terminate it, or may he just file the notice of controversion?

A. Well, it is a voluntary payment. They can do whatever they want at any time.

They could stop paying. They just subject themselves to the penalty provisions as they are outlined.

Q. So we are clear on that, that penalty provision is a waivable penalty provision by you?

A. Yes.

Q. By you, I mean by the deputy commissioner?

A. If the facts of the case indicate that their suspension and the timely controversion of the case was correct.

Q. If they were paying under an award, you could not waive the --

A. Technically, they cannot suspend.

Q. They cannot suspend?

A. No.

We could issue a default order. We would have a mechanism for making them pay.

Q. Now, an employer could commence the voluntary payment of compensation and file the 206 payment of compensation without award. Then. if he wished to have an award, could ask you to issue

one and obtain a stipulation of facts and you would issue one?
A. Yes.

The only problem -- and I have never seen it -- would occur if the claimant refused to sign the stipulation of fact. Then, what we would have to do, is refer the case to the ALJ for hearing and an ALJ would have to issue the order. I couldn't issue it.
Q. But absent the employee's refusal to agree to the fact that he is entitled to compensation, there is no problem issuing an award?
A. No, other than, again, confirming the information represented was accurate by the medical evidence in the case file, what have you.
Q. Now, under the procedures followed by the Department of Labor, who has the authority to issue awards or orders?
A. The deputy commissioner.
Q. The deputy commissioner only?
A. Only.
Q. The claim examiners?
A. No.

Only -- again, my formal title is claims examiner. But I am called

assistant deputy commissioner. I am one grade above the examiner. I supervise and manage the entire office.

I have delegated authority directly from the director to act as the deputy commissioner.

Q. But the claims examiner under you does not have that same delegated --

A. No.

He could not issue an award.

Q. Was any award ever issued in this case?

MR. BUCHHOLZ: Objection.

THE WITNESS: In the Alonzo Cummings --

MR. BUCHHOLZ: For the record --

MR. SOVEL: Yes.

MR. BUCHHOLZ: -- I don't think that is a fair question to ask Mr. McTaggart. That is a legal question. I think he should be so advised.

If you want to ask him if a formal award pursuant to one of the stipulations was ever issued, I don't have any objection to that.

MR. SOVEL: Okay.

MR. BUCHHOLZ: Okay.

MR. SOVEL: I will ask that question. But I am not agreeing altogether with your objection as being an appropriate one.

MR. BUCHHOLZ: Fine.

BY MR. SOVEL:

Q. Was any order or award issued by your office, by you as deputy commissioner, for this district in this case?

A. In the Alonzo Cummings case?

Q. Yes.

A. No.

Q. Now, you have brought with you, pursuant to my subpoena, a copy of the entire file in the Cummings case.

A. Yes, I have.

Q. Can you, briefly, by running through it, specify what the steps were and what papers were filed in the case?

By the way, are those papers in chronological order?

A. They are in the order that they put them in the file.

Q. Okay.

A. There may be some dates varying.

What we normally do initially when we get the case file made up -- again, this was made up in New York, not

my district initially, and then transferred to me -- is we will keep the 202 on the bottom and then work up chronologically as forms come in.

Q. Would you, then, proceed to go through the file from the filing of the 202 and tell us each step that occurred, if you can?

A. Well, there is a Form 202 dated June 6, 1979, in the case file.

I don't know the exact date it was received. I cannot make out the date it was received. The next form is Form 206.

Q. Which is what?

A. Payment of compensation without award.

This is dated June 13, 1979; was received June 18, 1979, in New York.

The additional information is medical reports from various treating physicians. There is a request for additional medical reports in the file. There is another request from our office for status.

Basically, what is happening is the file is being monitored by the claims examiner.

Am I going too fast?

Q. No. Go ahead.

Was there --

A. There was a suspension of compensation. There is a Form 208. That's dated February 15, 1980, indicating payments were suspended as of February 13.

The employer outlined the periods of compensation they paid.

They also noted that they felt they had made an overpayment.

Q. Okay.

A. There is a Form 203, which is a formal claim for compensation, dated March 12, 1980.

There is a retainer by your firm.

There is also a March 26, 1980, letter from the claims examiner in New York transferring the file to us, advising you -- this is our transfer form. We received the claim on April 15 of 1980 and requested to answer the claim.

An informal conference was scheduled by John DeLuca, the claims examiner, April 15. The informal

conference was to be held April 22, 1980.

There is a Form 280, which is a memorandum of informal conference.

Q. What was the recommendation of the claims examiner at that time?

A. On Page 2, temporary total disability compensation from February 8, 1980, to date and continuing, based on a compensation rate of $257.26 per week.

Q. By the way, is Mr. DeLuca authorized to issue orders or awards under the procedures of the Department of Labor?

A. He is a claims examiner.

Q. That means he is not authorized?

A. Only the deputy commissioner.

Q. Now, was that recommendation complied with?

A. Yes.

Q. What is the next form that you have?

A. We received the 208 form as indicating that payments continue at $257.26 per week, pending Dr. Simon's findings.

Q. Okay.

A. The payments were resumed approximately April of 1980.
Q. Now, that's a -- what form is that?
A. It is a 280 form. It is a suspension notice form.

In this type of situation, what we want to do is to see all the periods of temporary total. And this is a way -- they do note the instruction we normally give carriers and employer that if payments continue, please let us know in Item 11. In this one, that's what they do.
Q. So, while they are using the suspension form, it was really a notification of continued payments or --
A. Or acceptance.
Q. That operated as acceptance of the recommendation; is that correct?
A. Yes.

As far as we are concerned, it did. The payments were resumed.

Basically, we are down through their medical reports being received. The claim was referred to vocational rehabilitation adviser. Compensation was again suspended in December of 1980. Then payments were resumed in February

of 1980. The claimant was brought up to date.

The last notification about the situation was in February of 1981. "Payments are continuing."

Then we finish up with the notice of the deposition and medical reports that we received June 24.

Q. Now, at any time in this proceeding, as reflected in the file, did the employer ever request the issuance of an award?

A. No one did.

Q. If the employer did, could one have been issued?

A. Only with the stipulation from the claimant.

Q. That stipulation would have had to have been what?

A. An in-writing stipulation.

We have a form, if you want to see it.

We have two forms that we use. One is called exactly -- I hope I have two forms. Well, we have a stipulation of fact form. I don't know if I provided you with a copy of that or not.

Q. I don't have it in front of me.

A. Okay. But there is a stipulation of fact form. I can give it to you.

It, basically, is a form that can almost cover a general situation. We don't require that you use the form. We want a document of --

Q. What is the information that has to be stipulated to?

A. The injury, the disability, the period of disability, the average weekly wage, and notice was complied with; the extent of the various disabilities.

Q. Well, the employee in that situation would only disagree with the stipulation if he felt that either the wages were not enough, or something that he disagreed with in terms of the payment of compensation?

MR. BUCHHOLZ: Objection. That is not -- Mr. McTaggart is not in a position to answer that, to know what the employee would object to. I don't think it is a proper question.

BY MR. SOVEL:

Q. If the employee disagreed with the employer's statement of what his average

weekly wage would be, he can assert this --

A. That is a joint stipulation. So, obviously, if one of the two sides does not agree, we are not going to receive it.

Q. Okay.

A. You know, it would be -- it could be one or all 10 items.

Q. If the employee refuses to agree, then the employer can file a notice of controversion and get an award?

A. Yes.

If, in fact, the employer is paying based on what they feel to be represented and the only problem is that the claimant will not sign the stipulation so that we can issue an order, they will have to request a formal hearing to get their order.

If that is really not going to make anything different, if the claimant is being paid the proper compensation and being provided medical treatment and just refuses, I can't issue an order unless I can make a showing that the parties are in agreement on all issues. I would just have to refer it to an ALJ

and have him conduct a hearing. We can't hold hearings.

Q. The employer is in a position to force the issuance of an award it if wishes to?

A. The employer is an interested party and can request a hearing.

I have never had that occur.

Q. Right. Based on your experience and your knowledge of the procedures in the Act, if an employer is paying compensation at the correct amount, would it want to have an award against it?

MR BUCHHOLZ: Objection.

MR. SOVEL: Okay.

A. All right. Most payments are made voluntarily without award.

Most of the cases we get do not require an award. The Act mandates voluntary payments without award.

Q. Now, would you give me back my last question, please?

(Whereupon, the previous question was read by the Court Reporter.)

BY MR. SOVEL:

Q. Would the employer's rights be affected by paying the compensation

under award as compared to not under an award?

A. No.

There would be the same situation occurring. The only problem that would happen if an employer had an award is that they can't stop paying until they modify the award that they are under.

Q. They then become subject to those penalty provisions that you related to earlier?

A. Yes.

MR. SOVEL: Cross-examination.

MR. BUCHHOLZ: I am not sure I would call it cross-examination.

BY MR. BUCHHOLZ:

Q. Mr. McTaggart, I believe you said that the Longshore Act for the payment of compensation mandates voluntary payment without award; is that correct?

A. Yes.

Q. If an employer is aware that a longshoreman is injured on the job and is being treated for these injuries, the Act is so set up that the employer is expected to begin voluntary payment of compensation; isn't that right?

A. Yes.

Q. Is there, in fact, any basis for an employer who knows that the longshoreman is injured in the course and scope of his employment and is being treated for injuries arising thereof to controvert a claim?

A. No.

Q. In fact, if an employer controverted a claim which it admittedly knew had arisen during the course and scope of a longshoreman's employment, and that the longshoreman was receiving treatment for those injuries, the employer would be subject to penalties?

A. If they did not make the payment.

They can controvert all they want if they are paying the claim, it would not matter. We will get notice of controversions in cases where they are continuing to pay. They just want to clarify various issues that have arisen.

Q. In that situation where the employer has chosen to make voluntary payments and admits that the accident occurred during the course and scope of the employment, and the man is receiving

treatment, the only way that a formal award can be entered is with the claimant's own agreement; is that right?

A. No.

With the interested parties asking for an award consenting to the issuance of an award.

Q. Right.

So that would include --

A. The claimants have to agree to that. Yes.

Q. Can you give me some idea of what percentage of longshore cases compensation is initiated by the employer voluntarily without any informal or formal hearing?

MR. SOVEL: Objection. I think it has to be, certainly, within his own experience, not beyond.

THE WITNESS: You mean, just by my district office?

BY MR BUCHHOLZ:

Q. In your district?

A. I am roughly going to give you figures. Right now I have about 1800 files open, active, of which over 400 are being paid compensation.

We, in the past year -- in fact, we just did our quarterly review and analysis two days ago. I believe we have held 230 conferences this fiscal year so far which is in nine months.

No. I'm sorry. 99 conferences this year. Really, I would say, 90 to 95 per cent of the cases don't require informal proceedings or formal hearings.

Q. In those cases where the employer does not have a basis to controvert, the employer files a 206 form with the Department of Labor?

A. Yes.

MR. SOVEL: I will object to that because there is a legal conclusion in the use of the term basis for controversion.

MR. BUCHHOLZ: Okay.

BY MR. BUCHHOLZ:

Q. He files a Form 206?

A. We require a 206 form in cases where they are voluntary payments.

Q. Once a Form 206 report is on file with the Department of Labor, what if anything does that trigger within the Department of Labor?

A. Well, it triggers several things; one, when we jacket a case file, which is a file being made up for our review, we only jacket lost time cases. We do not jacket no lost time cases.

If a no lost time case would be jacketed, if we felt there would be permanency at a later date, such as a partial amputation or something, of a finger, we then send informational letters out. The first thing we will do is put in a request for information if it is not there. If we have the 206 received indicating payments are being made, the time frames are checked for accuracy. We make sure that that employer is paying within the proper time frame. The compensation rate is checked, as opposed -- it is mathematically checked, two-thirds of the average weekly wage. If there is a low average weekly wage, we will send an informational letter to the claimant advising him about how to compute an average weekly wage. The case file will be marked with a C indicating that that case file is presently in compensation

status. Then we will start triggering a review for request for medical.

We will also put in our call, possibly, a referral for rehabilitation. So, the 206 is an important function that we can keep. And we do keep track of the cases being compensated in the office. That's one of the requirements on the monthly report.

Q. If an employer chooses to initially controvert a claim, the first step thereafter is an informal hearing; is that right?

A. No.

The first step would be for the employer to provide us with a form called a 207, notice of controversion.

In that form they specifically tell the claimant why they are not paying. That form is sent, transmitted directly to us at that point, and we transmit it directly to the claimant with a letter instructing him what the next step is.

If he is going to controvert -- if he is going to make a claim for compensation, he is to contact our office. We will provide him with the forms.

Then we will get involved with the case. So, the notice of controversion comes in. It goes right out to the claimant. The case file is marked.

Every case where we receive a controversion notice is jacketed, whether it is lost time or no lost time.

Q. Then you will set up an informal hearing?

A. If, again, -- overall, a lot of the notices of controversion which we get do not require informal conferences because the problem was the fact that the claimant was not providing the medicals. They couldn't get the information. The wage information was not received.

So, I would say, we would get, maybe, 60 notices of controversion a month.

But realistically, they are being filed as a protective measure by some employers because they cannot get information that they can begin the payments within 14 days. And they do this.

Q. Then, the majority of those cases would get resolved without even an informal hearing?

A. Yes.

You take a jurisdictional dispute where an an employer is protecting themselves -- it may be a state case that they want to make sure that they run the statute under the Longshore Act. They will initiate payments under the statute, report it to the state. They will also file a 202 with us and raise a jurisdictional defense on a 207. We will jacket that case file and serve it on the employee with specific instructions as to what he is to do.

If he does not respond to that, his case file will be closed in four months.

Q. If, in fact, you go to an informal conference with an employer and employee, it is a step down the road of a controversy?

A. It is beginning -- technically, it is called a prehearing conference.

Q. Right.

A. Almost a last step of the informal proceedings.

Q. Right. No orders or awards are issued our of that informal hearing, are they?

A. As a result of it, they can be.

Q. Not --

A. If the parties agree.

Q. An award can be issued?

A. Well, if the parties agree and request an award, they are given specific instructions. We will even hand them the stipulation of fact form to submit at which time we would issue an award, if appropriate.

Q. Okay.

A. As a result of the informal conference.

But the memorandum of informal conference would indicate that this is the next step. The parties are going to apply for an 8I(a) settlement, or that the parties are going to submit stipulations and request the formal award, or the parties are going to just pay voluntarily.

Q. In this particular case with Mr. Cummings, you said the 206 report was initially received by the Department of Labor when?

A. The first one?
Q. Yes.
A. June 18.
It is stamped on the back, 1979.
Q. Is a copy of that required to be sent to the claimant?
A. By the employer.
The instruction on there is that the notice be sent to the deputy commissioner, copies to be sent to the person who is receiving compensation.
Q. When that 206 report was received by the Department of Labor, that would have triggered setting up a file and beginning to monitor this matter; is that right?
A. Well, that's what they did in New York.
Q. Did you also receive a 204 report in this case?
MR. SOVEL: A what?
MR. BUCHHOLZ: 204.
A. That would be an attending physician's report.
I believe there are -- yes. There are 204's in here.
BY MR. BUCHHOLZ:

Q. Can you tell me when the first one was received?
A. July 18, 1979, from Dr. Frank Mattei, dated July 11, 1979.
Q. Since you had already received the 206 report, did the subsequent receipt of the 204 report trigger any additional activity?
A. We medically monitored the case.

If an additional clarification was needed, whatever action we -- again, the 204 is really the medical aspects of the case. A doctor could submit a narrative that would suffice if he covered all the information we are looking for.
Q. You say that there was no -- and I put this in quotes -- "formal award" earned in this case; is that right?
A. To my knowledge, no. There was none.
Q. In what percentage of cases, in your experience, are "formal awards" as set forth in these regulations issued?
A. I would take a rough estimate of 5 per cent would be high.

MR. BUCHHOLZ: I don't have any other questions.

BY MR SOVEL:

Q. With respect to the issuance of formal awards, these are sometimes done with respect to the awarding of scheduled lost benefits under Section 8 of the Act?

A. Yes. Some.

It depends on the employer. Some employers, when they get a final resolution, will request an award. Normally, when we get to the permanent partial disability aspect of a case -- and I will clarify that -- we have an injured employee who is temporarily totally disabled for a period of time. He then returns to work. Normally, we have a regular process where we, in monitoring the cases, will request what is called a PPI examination. If it is a potential case -- in other words, if it is a fracture of one of the members covered under the schedule, we will request this. The report would come in. The contact by the employer with the claimant or the claimant's representative would indicate they accept the rating provided by the examining physician. They they would draw up a stipu-

lation to the fact and request an order. Some employers will do this.

What they are getting is an award that is final in 30 days. And the claimant has one year to apply for modification. Other employers will elect not to -- they will simply voluntarily pay this compensation.

The key thing there is that with the order, the award is final in 30 days, period. And the claimant has a year to apply for a modification.

If it is a voluntary payment, and if the claimant has filed a formal claim for compensation, you know, he has no statute problems. The case is unadjudicated formally.

Q. So he can reopen it or come in at any time in the future?

A. Yes, he can.

Q. Then, certain employers as a matter of policy request awards under those circumstances?

A. In some cases, yes.

Q. You issue those awards?

A. If it is appropriate with the evidence in the case file and we have the appropriate stipulations, yes.

MR. SOVEL: Thank you.

(Whereupon the deposition was concluded at 10:50 a.m.)

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In the Supreme Court of the United States

OCTOBER TERM, 1982

PALLAS SHIPPING AGENCY, LTD., PETITIONER

v.

JOSEPH DURIS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF AFFIRMANCE

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QUESTION PRESENTED

Whether, in the absence of an award in a formal compensation order, an employee's acceptance of workers' compensation payments triggers an assignment to the employer of the employee's right to recover damages from a third party under Section 33(b) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 933(b).

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-502

PALLAS SHIPPING AGENCY, LTD., PETITIONER

v.

JOSEPH DURIS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF AFFIRMANCE

INTEREST OF THE UNITED STATES

This case involves the proper application of the assignment provisions of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. (& Supp. V) 901 *et seq.*, to the tort action of an employee against a responsible third party. The Secretary of Labor, the government official charged with the responsibility of administering the complex statutory provisions of the LHWCA, has a substantial interest in assuring that the Court has before it an accurate picture of the administrative procedures involved in this litigation and of the possible impact of the parties' positions on these procedures.

STATEMENT

1. The Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. (& Supp. V) 901 *et seq.*, provides maritime employees with a comprehensive workers' compensation scheme for disability or death resulting from

injuries occurring on or adjoining navigable waters. Administration of the Act is vested in the Secretary of Labor, 33 U.S.C. 939, who has delegated this responsibility to the Department of Labor's Office of Workers' Compensation Programs (OWCP). 20 C.F.R. 701.201-701-203. See *Director, OWCP* v. *Perini North River Assoc.*, No. 81-897 (Jan. 11, 1983), slip op. 5 n.10.

Compensation payable under the LHWCA is the employee's exclusive source of recovery from the employer. 33 U.S.C. 905(a). The LHWCA, however, preserves the employee's right to recover full damages from a negligent third party, commonly the vessel owner. 33 U.S.C. 905(b), 933(a). Under Section 33 of the Act, 33 U.S.C. 933,[1] the provision at issue here, an employee who accepts "compensation under an award in a compensation order filed by the deputy commissioner or [the Benefits Review] Board" retains the right to sue a responsible third party for six months; thereafter the employee's right to sue a third party is irrevocably assigned to the employer. 33 U.S.C. 933(b).

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[1]Section 33 of the LHWCA, 33 U.S.C. 933, provides in pertinent part:

> (a) If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages he need not elect whether to receive such compensation or to recover damages against such third person.
>
> (b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner or Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

See *Rodriguez* v. *Compass Shipping Co.*, 451 U.S. 596 (1981).[2]

Unless an employer controverts its liability under the Act, it must pay compensation to a disabled employee or his survivors beginning two weeks after it has knowledge of the employee's injury or death. 33 U.S.C. 914; 20 C.F.R. 702.231-702.232. If the employer does not contest a claim, compensation is paid voluntarily, *without an award*, and an appropriate form, Form LS-206 ("Payment of Compensation Without Award"), is filed with the deputy commissioner in the Department of Labor. 33 U.S.C. 914; 20 C.F.R. 702.234. Should an employer thereafter terminate payments, an appropriate form, Form LS-208 ("Compensation Payment Stopped or Suspended"), is filed with the deputy commissioner. 33 U.S.C. 914(c); 20 C.F.R. 702.234. The employee has one year from receipt of the last payment made without an award in which to file a claim for compensation payments under the Act. 33 U.S.C. 913(a).

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[2]The employer has a lien against its employee's recovery from a responsible third party for the full amount of its compensation obligations. 33 U.S.C. 933(f). See *Bloomer* v. *Liberty Mutual Ins. Co.*, 445 U.S. 74 (1980); *Dodge* v. *Mitsui Shintaku Ginko K.K. Tokyo*, 528 F.2d 669, 674 (9th Cir. 1975), cert. denied, 425 U.S. 944 (1976). If the employee settles an action against a third party for an amount less than the value of the employer's compensation liabilities without the employer's written consent, the employer is released from any further obligation to pay compensation. 33 U.S.C. 933(g). Should the employer, as assignee of the employee's claim, recover from a culpable third party, the employer retains the amount of its compensation obligations and its litigation costs, and 20% of the excess. The remaining 80% of the excess is payable to the employee. 33 U.S.C. 933(e); *Rodriguez* v. *Compass Shipping Co.*, *supra*, 451 U.S. at 600-601. The employer also has a non-statutory right of action against a responsible third party for indemnification in the amount of the compensation awarded. Pet. App. A4; *Federal Marine Terminals, Inc.* v. *Burnside Shipping Co.*, 394 U.S. 404 (1969); *Dodge* v. *Mitsui Shintaku Ginko K.K. Tokyo*, *supra*, 528 F.2d at 673.

When an employer controverts a compensation claim, the deputy commissioner is notified either by the employer's filing of a notice of controversion (33 U.S.C. 914(d); 20 C.F.R. 702.251) or by the employee's filing of a notice of a contested claim (20 C.F.R. 702.261). Filing of either notice activates the administrative adjudication procedures described in regulations promulgated by the Department of Labor. 20 C.F.R. 702.301-702.394. Contested claims, if carried to formal hearings, result in the issuance of formal compensation orders containing appropriate findings of fact and conclusions of law. 33 U.S.C. 919(c) and (e); 20 C.F.R. 702.348-702.349. These formal compensation orders are enforceable in federal district court under the procedures set out in 33 U.S.C. 918 and 921(d). See also 20 C.F.R. 702.372.

Where agreement between the parties is reached before the formal hearing stage, the agreement is embodied in a memorandum placed in the administrative file of the deputy commissioner. 20 C.F.R. 702.315. Either party can thereafter request and obtain a formal compensation order. 20 C.F.R. 702.315(a) ("If either party requests that a formal compensation order be issued the deputy commissioner shall, within 30 days of such request, prepare, file and serve such order * * *").

Under the statute and administrative practice, a "compensation order" is a well-defined instrument with a variety of legal effects; no lesser document is afforded its legal significance. A compensation order is always filed and served by a deputy commissioner, a person specifically appointed as the delegate of the Secretary of Labor. 33 U.S.C. 939, 940; 20 C.F.R. 701.201-701.203.[3] Compensation orders, but not memoranda of settlement agreements,

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[3]The authority to issue compensation orders is not delegated to claims examiners, although they may issue memoranda of agreements. 20 C.F.R. 702.312, 702.315.

are reviewable by the Benefits Review Board. See generally 33 U.S.C. 919(c), 919(e), 921(a), 921(b)(3). Most important, compensation orders are enforceable in court. 33 U.S.C. 918, 921(d). Memoranda of agreements, even if they refer to an "award," are never filed in the form of or served as compensation orders and do not have the binding and conclusive effect of such orders. Thus, if only a memorandum of agreement is on record, the employer is free to stop compensation payments and litigate its liability under the Act.[4]

2. Respondent Joseph Duris was injured in May 1975 while working as a longshoreman on a vessel in the port of Toledo, Ohio. Shortly after his injury, Duris began to receive LHWCA compensation payments from his employer. It is undisputed that Duris' benefits were paid voluntarily; the deputy commissioner entered no compensation order or award in this case (Pet. App. A2). On June 2, 1975, Form LS-206, "Payment of Compensation Without Award," was issued by the employer's claims adjuster (Br. in Opp. App. A1). On April 26, 1977, Duris' employer terminated the payment of benefits by filing Form LS-208, "Compensation Payment Stopped or Suspended" (Pet. 2; Pet. App. A2).

In April 1980, Duris filed a personal injury suit against petitioner Pallas Shipping Agency, Ltd., in the United States District Court for the Northern District of Ohio. The

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[4]Once a formal compensation order has been issued, the employer's obligation to pay is enforceable in court and delays in payment automatically trigger statutorily prescribed penalties. 33 U.S.C. 914(f). By contrast, if an employer agrees to make payments, as reflected in a memorandum filed after an informal conference, the provisions of the LHWCA controlling payments without an award apply. 33 U.S.C. 914(e). Under these provisions, the employer is free to change its position, file a "notice of controversion," and terminate payments — without incurring additional liability. 33 U.S.C. 914(d), 914(e).

district court dismissed the action for lack of in personam jurisdiction over Pallas.[5] The court did not reach the question whether Duris had lost his right to sue by the operation of the assignment provisions of Section 33(b) of the LHWCA, 33 U.S.C. 933(b).

The court of appeals reversed, holding that jurisdiction over Pallas Shipping Agency, Ltd., had been established.[6] The court of appeals also resolved the assignment issue not addressed by the district court.[7] The court ruled that, based on the "purposeful use of the term 'award' " in Section 33(b) of the LHWCA, no assignment of Duris' cause of action had occurred because his employer had paid benefits voluntarily without an award (Pet. App. A2-A3, A8-A9). The court held that "the mere receipt of compensation benefits under the Act does not trigger the assignment provisions of section 33(b)" (Pet. App. A8). Thus, "[w]here, as here, the injured employee has merely accepted compensation payments, no assignment occurs and the third party claim does not expire in six months" (*ibid.*).

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[5]Erato Shipping was the dry boat charterer of the vessel on which Duris was injured. Erato was subsequently merged into petitioner Pallas Shipping Agency, Ltd. (Pet. App. A2). The district court concluded that "service of process against Pallas shipping was improper because that company had never done any business in Ohio" (*id.* at A8).

[6]The court found that, following a merger, the surviving corporation is liable for the claims against each constituent corporation. "Any other ruling would allow corporations to immunize themselves by formalistically changing their titles" (Pet. App. A9). Petitioner did not raise the jurisdictional issue in its petition for a writ of certiorari, and the propriety of the court of appeals' finding of in personam jurisdiction in this case is not before the Court (Pet. 4).

[7]Petitioner raised the Section 33(b) assignment issue before the court of appeals as an alternative ground upon which to affirm the decision of the district court (Pet. App. A2).

SUMMARY OF ARGUMENT

1. The court of appeals correctly held that, absent a formal award embodied in an official compensation order, the assignment provisions of Section 33(b) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 933(b), are not triggered by an injured employee's acceptance of compensation. Congress deliberately employed a term of art in describing the event that would activate the assignment provisions: "an award in a compensation order filed by the deputy commissioner or Board." Such precise wording must be given its full intended effect.

The legislative history of the LHWCA demonstrates that Congress amended Section 33(b) in 1938 to make assignment of an employee's third-party rights contingent upon the filing of a formal compensation order. The express purpose of this amendment was to alleviate hardship on employees who might unwittingly assign away their rights to sue third-party tortfeasors simply by accepting statutory benefits from their employers. The perceived need for such protection was undiminished in 1959, when Section 33 was again amended and Congress intentionally retained the requirement of a formal award.

2. Contrary to petitioner's contention, insistence on a formal award does not impede the provision of prompt compensation to injured workers. Employers need not refuse to make payments and litigate their liability in administrative proceedings in order to obtain formal compensation orders. Under the Department of Labor's regulations and practices, a party to an informal compensation agreement may obtain a formal compensation order on request. Employers, moreover, may avail themselves of an independent tort action to recoup the amount of compensation benefits paid as the result of a third party's negligence. Thus, compliance with the plain terms of Section 33(b) does not burden employers or retard the compensation process.

3. A rule permitting anything less than a formal compensation order to trigger the assignment provisions of Section 33(b) would frustrate a major purpose of the LHWCA's third-party liability provisions. The underlying premise of Section 33(b) is that third-party tortfeasors ultimately should be held liable for any damages caused by their negligence. Petitioner's construction of the Act, however, bars otherwise meritorious suits by injured employees, allowing many third-party tortfeasors to escape liability, merely because a workers' compensation scheme is in place.

ARGUMENT

I. THE PRECISE LANGUAGE AND LEGISLATIVE HISTORY OF SECTION 33(b) MAKE A FORMAL COMPENSATION ORDER AN ABSOLUTE PRECONDITION TO OPERATION OF THE ASSIGNMENT PROVISIONS OF THE LHWCA

Section 33(b) of the LHWCA identifies in unambiguous terms the event necessary to trigger assignment to the employer of an employee's cause of action against a third party: acceptance of compensation "under an award in a compensation order filed by the deputy commissioner or Board." 33 U.S.C. 933(b). Congress' use of such precise language in the context of a detailed regulatory statute must be given its full effect. *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979). See also *Rodriguez* v. *Compass Shipping Co.*, 451 U.S. 596, 604 (1981) (statutory language of the LHWCA must be regarded as conclusive, absent a clearly expressed legislative intention to the contrary); *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

As utilized throughout the LHWCA, the term "compensation order" has a clearly defined meaning. Compensation orders are binding upon employers and are enforceable in

court. 33 U.S.C. 918, 921(d). An employer's firm statutory obligations under a compensation order contrast significantly with the more flexible procedures that prevail when compensation payments are made without a formal award. 33 U.S.C. 914(d), 914(e). Because of the distinction drawn by the LHWCA between compensation payments made with and without a formal compensation order, there is no basis for deviating from the express statutory language in construing Section 33(b) of the Act. Acceptance of compensation "under an award in a compensation order filed by the deputy commissioner or Board" is an absolute prerequisite to the statutory assignment of an employee's third-party rights to his employer. 33 U.S.C. 933(b).[8]

In light of the lack of any ambiguity in the statute itself, no inquiry into the legislative history of Section 33(b) is necessary. *Rubin* v. *United States*, 449 U.S. 424, 430 (1981); *TVA* v. *Hill*, 437 U.S. 153, 184 n.29, 187 n.33 (1978). In any event, however, the legislative history of the LHWCA demonstrates conclusively that Congress' utilization of the critical phrase in Section 33(b) was deliberate. As the court below properly recognized (Pet. App. A3), such purposeful language must be honored.

Before enactment of the LHWCA in 1927, maritime employees had the right to bring maritime tort actions

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[8]Contrary to petitioner's assertion, this Court's ruling in *Rodriguez* v. *Compass Shipping Co.*, *supra*, did not establish "that the entry of a formal award in a compensation order is not required to support an assignment under § 933(b)" (Pet. Br. 14). The Court in *Rodriguez* declined to address whether settlement agreements or other administrative procedures are "equivalent to formal orders for purposes of § 33(b)" (451 U.S. at 598-599 n.3). Rather, the Court simply assumed that the prerequisites to a Section 33(b) assignment had been met in that case (*ibid.*).

against negligent third parties.[9] The 1927 Act did not eliminate this right, but did require an injured worker to elect between accepting compensation and seeking damages from a responsible third party. Section 33, 44 Stat. 1440. If the injured worker accepted compensation, the worker's right of action against the third party was assigned automatically to the employer. 44 Stat. 1440.[10] Under the original Act, nothing more than the acceptance of compensation was required to evidence the employee's election. *Rodriguez* v. *Compass Shipping Co., supra,* 451 U.S. at 604; *American Stevedores, Inc.* v. *Porello,* 330 U.S. 446, 454 n.18 (1947).

The election of remedies requirement was modified in the 1938 amendments to the LHWCA. Congress changed the event that triggered an election and assignment from mere acceptance of "compensation" to acceptance of "compensation under an award in a compensation order filed by the deputy commissioner." Section 14, 52 Stat. 1168. Thus, an employee would not be required to elect between accepting

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[9]For general discussions of a LHWCA claimant's right to seek damages from a third party and the history of Section 33 of the Act, see *Bloomer* v. *Liberty Mutual Insurance Co.,* 445 U.S. 74, 79-81 (1980), and *Rodriguez* v. *Compass Shipping Co., supra,* 451 U.S. at 604-612.

[10]As originally enacted, and until 1938, Section 33 of the LHWCA read in pertinent part (44 Stat. 1440):

> (a) If on account of a disability or death for which compensation is payable under this Act the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy commissioner in such manner as the commission may provide, to receive such compensation or to recover damages against such third person.
>
> (b) Acceptance of such compensation shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person, whether or not the person entitled to compensation has notified the deputy commissioner of his election.

compensation and seeking damages from a responsible third party *unless* the compensation was paid under an award by a deputy commissioner. 52 Stat. 1168.[11] By reducing the danger that an employee would make an election without being advised of its consequences, amended Section 33(b) shielded employees from the harsh consequences of an improvident election. *Rodriguez* v. *Compass Shipping Co., supra,* 451 U.S. at 605. As the House Committee explained (H.R. Rep. No. 1945, 75th Cong., 3d Sess. 9 (1938)):

> The purpose of this amendment is to remove possible cause of complaint regarding the operation of the provision in subdivision (b) of section 33 in making the mere acceptance of compensation work automatically an assignment to the employer of all rights of action against the third party tort feasor. Acceptance of compensation without knowledge of the effect upon such rights may work grave injustice. The assignment of this right of action against the third party might properly be contingent upon the acceptance of compensation under an award in a compensation order issued by the deputy commissioner, thus giving opportunity to the injured person * * * to consider the acceptance of compensation from the employer with the resulting loss of right to bring suit in damages against the third party, or a refusal of compensation so as to pursue the remedy against the third party alleged to be liable for the injury.

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[11]From 1938 until 1959, Section 33(b) of the LHWCA provided (52 Stat. 1168):

> Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person.

At the time of the enactment of the 1938 amendments to the LHWCA, the phrase "compensation order filed by the deputy commissioner" carried the same technical meaning that it does today. See Section 19, 44 Stat. 1435-1437. A compensation order was a formal document filed by a deputy commissioner. 44 Stat. 1435-1437. Statutory penalties attached automatically to violation of a compensation order (the employer could not terminate payments and relitigate liability without incurring a penalty), and the order itself was enforceable in federal district court. Sections 14 and 19, 44 Stat. 1432-1433, 1435-1437. Congress deliberately employed a term of art in the 1938 amendments and did not intend anything less than a formal award in a compensation order to satisfy the condition precedent to the assignment of an employee's cause of action. *American Stevedores, Inc.* v. *Porello, supra,* 330 U.S. at 456.[12] See also *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Corp.*, 350 U.S. 124, 127 n.2 (1956) ("A longshoreman, after accepting compensation payments from his employer without an award, may sue a third-party tortfeasor for his injuries").

The legislative history of the LHWCA since 1938 reveals that Congress has not retreated from the explicit requirement of an award in a formal compensation order prior to

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[12]The issue in *Porello* was whether acceptance of compensation without an award resulted in an *election* by the employee not to sue a third party. This Court took it as a given that, after the 1938 amendments, mere acceptance of compensation did not operate as an *assignment*. "[Section] 33(b) of the Longshoremen's Act was amended in 1938 so that mere acceptance of compensation, without an award, does not operate as an assignment to the employer of the injured employee's cause of action against a third-party tortfeasor * * *." *American Stevedores, Inc.* v. *Porello, supra,* 330 U.S. at 454. Reasoning that "election not to sue a third party and assignment of the cause of action are two sides of the same coin," 330 U.S. at 455, the Court held that mere acceptance of compensation was also insufficient to effect an *election* under Section 33(a). 330 U.S. at 454-456.

assignment of an employee's third-party rights under Section 33(b). Indeed, Congress has added additional safeguards to prevent an employee from unwittingly losing the right to sue third parties.

In 1959, Congress extensively amended Section 33 of the LHWCA (73 Stat. 391). These amendments were based on Congress' recognition that, under existing law, injured employees generally did not pursue third-party actions because of the election of remedies requirement and the need for speedy compensation payments to meet current expenses. *Bloomer* v. *Liberty Mutual Insurance Co.*, 445 U.S. 74, 80 (1980). The 1959 amendments, therefore, abolished the election requirement that had previously faced injured employees, and additionally gave them a six-month period during which they could accept payments under a compensation order without losing a potential cause of action to their employers.

Section 33(a) of the Act was amended to provide that an employee "need not elect" whether to receive compensation or recover damages from a third-party tortfeasor. 73 Stat. 391. Section 33(b), in turn, was amended to permit an employee to accept payments under an award in a compensation order for six months before the right to sue responsible third parties would be assigned to the employer. 73 Stat. 391. Thus, following the 1959 amendments, an employee's third-party right of action is assigned to the employer only by (1) the acceptance of compensation under a formal compensation order and (2) the passage of six months. *Rodriguez* v. *Compass Shipping Co., supra,* 451 U.S. at 602-603.

The 1959 amendments expressly retained the phrase "compensation under an award in a compensation order filed by the deputy commissioner" in Section 33(b) of the Act. The congressional intent in preserving this and other language of Section 33 was "to continue the current judicial construction of much of the section." Analysis of Bill

to Amend Section 33 of the Longshoremen's and Harbor Workers' Compensation Act, 105 Cong. Rec. 9226 (1959). Judicial construction of Section 33(b) at the time of the 1959 amendments precluded an assignment under the Act without an award in a compensation order. In 1947, for example, this Court wrote that "mere acceptance of compensation, without an award, does not operate as an assignment to the employer of the injured employee's cause of action against a third-party tortfeasor." *American Stevedores, Inc.* v. *Porello, supra,* 330 U.S. at 454. See also *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Corp., supra,* 350 U.S. at 127 n.2.[13] Congress reaffirmed in 1959, therefore, that the protection of an official compensation order must be afforded an injured employee who, because of the informality of the voluntary compensation procedures under the LHWCA, might otherwise unknowingly forfeit his right to sue a third-party tortfeasor simply by accepting benefits. When a formal compensation order is served on the employee (20 C.F.R. 702.349), the employee is put on notice by the plain language of the statute that any suit to recover damages from a third party must be brought within six months.[14]

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[13]In *Grasso* v. *Lorentzen,* 149 F.2d 127 (2d Cir.), cert. denied, 326 U.S. 743 (1945), the court of appeals held that where an employer voluntarily made payments and there was no award under the Act, no assignment under Section 33(b) of the LHWCA occurred. In dictum, however, the *Grasso* court said the award required by Section 33(b) could be "informal." 149 F.2d at 128-129. The dictum in *Grasso* was revived 30 years later by the Fourth Circuit in *Liberty Mutual Ins. Co.* v. *Ameta & Co.,* 564 F.2d 1097, 1102 (1977), a principal case relied upon by petitioner (Pet. 10-11).

[14]In this case, there was nothing in the events following his injury to alert respondent Duris to the possibility that he could lose his right to sue petitioner simply by accepting compensation from his employer's claims adjuster. Even if Duris had an inkling that the assignment provisions of Section 33(b) of the LHWCA might be called into play by his acceptance of compensation payments, he would surely have been

Despite the clear statutory terms and legislative history of Section 33(b), the Second and the Fourth Circuits do not require an award in a formal compensation order prior to effectuating an assignment under the statute. The Fourth Circuit has ruled that the assignment provisions of Section 33(b) are triggered, in effect, whenever an injured employee accepts a compensation payment from his employer. In *Simmons* v. *Sea-Land Services, Inc.*, 676 F.2d 106, 109 (4th Cir. 1982), cert. denied, No. 82-56 (Oct. 12, 1982), the court reached this result by holding that "an award in a compensation order" within the meaning of Section 33(b) is created by three events:

> (1) the employer, having not contravened its liability, initiates compensation payments to the longshoreman; (2) the deputy commissioner files the employer's notice that compensation payments have been initiated; and (3) the longshoreman accepts any of the payments.

See also *Liberty Mutual Ins. Co.* v. *Ameta & Co.*, 564 F.2d 1097, 1101-1103 (4th Cir. 1977).

The Second Circuit agrees with the Fourth that a formal award in a compensation order is not required to begin the six-month period that must expire prior to assignment under Section 33(b). The Second Circuit, however, disagrees with the Fourth on the events that commence the running of the period. The Second Circuit has concluded that the six-month period begins when the total amount of compensation benefits to be received by the injured worker is fixed — whether by formal order, informal award, or stipulation of the parties. *Verderame* v. *Torm Lines*, 670

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disabused of that notion if he had consulted the statute, which refers to an assignment following acceptance of payments "under an award." The employer's notice to Duris was entitled, "Payment of Compensation *Without* Award" (Br. in Opp. App. A1) (emphasis added).

F.2d 5, 7 (2d Cir. 1982).[15] See also *D'Amico* v. *Cia de Nav. Mar. Netumar*, 677 F.2d 249 (2d Cir. 1982); *Ambrosino* v. *Transoceanic Steamship Co.*, 675 F.2d 470, 471-472 (2d Cir. 1982); *Rodriguez* v. *Compass Shipping Co.*, 617 F.2d 955, 957 (2d Cir. 1980), aff'd on other grounds, 451 U.S. 596 (1981).

The above decisions, in effect, cut off an injured employee's right to sue a third-party tortfeasor simply because the employee accepts compensation under the LHWCA. In reliance on these decisions, petitioner would force an injured employee to refuse compensation payments in order to preserve the right to sue beyond six months. This result, as the court below noted (Pet. App. A6), returns the LHWCA to its pre-1938 "election of remedies" condition, notwithstanding the fact that the election requirement of the original Act was eliminated by Congress in 1959.[16]

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[15]The question of when an employee has received adequate knowledge that the total amount of his compensation has been "fixed" seems to call for case-by-case adjudication. See *Verderame* v. *Torm Lines, supra*, 670 F.2d at 7. The Second Circuit's test thus creates considerable uncertainty as to who can bring the employee's cause of action against a third-party tortfeasor.

[16]The Fourth Circuit stated that the six-month period provided by the 1959 amendments protects a worker from a harsh election of remedies decision. *Simmons* v. *Sea-Land Services, Inc., supra*, 676 F.2d at 109. The practical protection provided by the six-month period is scant, however, because the worker is rarely aware that the acceptance of compensation benefits significantly compresses the time within which any suit against a third party must be brought. See Pet. App. A6; *Dunbar* v. *Retla Steamship Co.*, 484 F. Supp. 1308, 1311 (E.D. Pa. 1980). Moreover, the legislative history of the 1959 amendments to Section 33 of the LHWCA does not evidence any intent to cut back on the remedies available to employees after the 1938 amendments to the Act, when employees could accept compensation without an award and still sue a third party. *American Stevedores, Inc.* v. *Porello, supra*, 330 U.S. at 454.

The explicit terms of Section 33(b) and its legislative history bar the result reached by the Second and Fourth Circuits. Congress has expressly provided that an injured employee cannot be deprived of a cause of action against a third-party tortfeasor prior to the issuance of an official compensation order. See *Dunbar* v. *Retla Steamship Co.*, 484 F. Supp. 1308, 1311 (E.D. Pa. 1980). The decisions of the Second and Fourth Circuits fail to provide a persuasive basis for disregarding the clear terms of Section 33(b).

II. SECTION 33(b)'S EXPLICIT REQUIREMENT OF A FORMAL COMPENSATION ORDER DOES NOT IMPEDE THE PROMPT PAYMENT OF COMPENSATION TO INJURED WORKERS OR IMPOSE UNDUE BURDENS ON EMPLOYERS

In abandoning the requirement of a formal compensation award, the Fourth Circuit was motivated principally by the desire to foster the prompt payment of compensation to injured employees by not clogging the administrative process. *Simmons* v. *Sea Land Services, Inc., supra,* 676 F.2d at 109; *Liberty Mutual Ins. Co.* v. *Ameta & Co., supra,* 564 F.2d at 1103. See also *Larson* v. *Associated Container Transportation (Australia) Ltd.*, 459 F. Supp. 561, 564 (E.D. Va. 1978). The decisions in the Second Circuit appear to proceed on similar grounds. See, *e.g., Rodriguez* v. *Compass Shipping Co., supra,* 617 F.2d at 959.[17] Petitioner (Pet. Br. 15) and these courts erroneously assume that if a

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[17]In *Rodriguez* v. *Compass Shipping Co., supra,* the parties to an informal compensation agreement contemplated that a formal compensation order would be filed. The formal order, however, was not forthcoming, even though issuance was required by Department of Labor regulations. 617 F.2d at 959. In these circumstances, the court concluded that "[t]o delay the operation of § 33(b) until the filing of [a formal compensation] order would be to exalt form over substance" (*ibid.*). Although the result in *Rodriguez* may be understandable on its peculiar facts, the Second Circuit has expanded its "form over substance" analysis to widely divergent factual situations where departure

formal compensation order is held to be a necessary precondition to the operation of Section 33(b), employers will be forced to controvert and litigate their liability in adminiitrative proceedings for the purpose of obtaining a compensation order. *Simmons* v. *Sea-Land Services, Inc., supra,* 676 F.2d at 109; *Liberty Mutual Ins. Co.* v. *Ameta & Co., supra,* 564 F.2d at 1103, *Larson* v. *Associated Container Transportation (Australia) Ltd., supra,* 459 F. Supp. at 564. Such a result would "deny the injured person prompt monetary and medical assistance at a time when he needs it the most" (Pet. 10, quoting *Larson* v. *Associated Container Transportation (Australia) Ltd., supra,* 459 F. Supp. at 564).

In reality, however, employers are not required to litigate liability in order to obtain a formal compensation order. Where payments are made voluntarily, as in this case, the employer may obtain a compensation order simply by requesting one. Deputy commissioners will issue compensation orders on request where there is no disagreement among the parties. See 20 C.F.R. 702.315(a). The employer certainly need not discontinue compensation payments to obtain a compensation order.

By the same token, filing a notice of controversion does not necessarily entail cessation of payments. Where a notice of controversion is filed and the claim is resolved via the informal procedures established by the Department of Labor, the deputy commissioner is required by regulation to issue a compensation order on request. 20 C.F.R. 702.315. Furthermore, the appropriate payments must be

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from the clear statutory language of Section 33(b) cannot be justified by an appeal to equity. See, *e.g., Verderame* v. *Torm Lines, supra,* 670 F.2d at 7 (an award in a compensation order within the meaning of Section 33(b) may be established by stipulation of the parties or "informal award").

made without awaiting receipt of the formal compensation order. *Ibid.* See *Intercounty Construction Corp.* v. *Walter*, 422 U.S. 1, 4 n.4 (1975). Thus, contrary to petitioner's contention (Pet. Br. 15), a plain, straightforward reading of Section 33(b)'s language will not result in unnecessary litigation or undue delay in compensation payments.

Insistence on a formal compensation order also works no substantial hardship on employers. As noted above, the employer may obtain a formal compensation order on request. 20 C.F.R. 702.315. Moreover, although requiring a compensation order prior to a Section 33(b) assignment would affect when an employer receives a statutory assignment of an employee's third-party rights, it does not materially affect the employer's opportunities to recoup its compensation payments. Even if the employer does not obtain an assignment under Section 33(b), the employer has an equitable lien, in the amount of its compensation obligations, on any recovery by the employee. 33 U.S.C. 933(f). Similarly, if the employee settles with a third party for less than the employer's liabilities without the employer's consent, the employer is released from further compensation payments. 33 U.S.C. 933(g). Finally, the employer has an independent cause of action against the third-party tortfeasor in indemnification for the amount of its compensation liabilities. *Federal Marine Terminals, Inc.* v. *Burnside Shipping Co.*, 394 U.S. 404 (1969).[18] In these circumstances,

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[18]Unlike the recoveries noted above, Section 33(e) of the LHWCA does give employers who pursue an assigned cause of action a 20% "bounty" on any damages awarded in excess of their litigation and compensation costs. 33 U.S.C. 933(e). See note 2, *supra*. Employers, however, rarely take advantage of this statutory incentive for employer-initiated litigation. As the court below recognized (Pet. App. A7-A8), the usual continuing relationship between stevedoring employers and their clients — the vessel owners or charterers — operates to discourage employers from pursuing the assigned claims of their employees. See *Dunbar* v. *Retla Steamship Co.*, *supra*, 484 F. Supp. at 1311-1312 n.5.

where obtaining a compensation order is neither onerous to the employer nor a detriment to the prompt payment of compensation benefits, the unambiguous terms of Section 33(b) should control.[19]

III. ABANDONMENT OF THE FORMAL AWARD REQUIREMENT VITIATES A BASIC PRINCIPLE OF WORKERS' COMPENSATION LAW UNDERLYING SECTION 33(b)

As noted above, the position espoused by petitioner does not directly benefit injured employees or their employers. The real beneficiaries of petitioner's construction of Section 33(b) are third-party tortfeasors, who gain a technical defense that enables them to evade liability in clear contravention of legislative intent.

Section 33 of the LHWCA, as amended in 1938 and 1959, is designed to facilitate suits against third parties. Indeed, the fundamental premise of Section 33 is that third-party tortfeasors should not be relieved of their legal liabilities solely because a workers' compensation program governs the rights of employers and employees with respect to each

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An employer's dependence on its clients for future business reduces the employer's willingness to bring suit despite the financial incentives of Section 33(e). See *Longshoremen's and Harbor Workers' Compensation Act (Third Party Liability): Hearings on Bills Relating to the Longshoremen's and Harbor Workers' Compensation Act Before the Special Subcomm. of the House Comm. on Education and Labor*, 84th Cong., 2d Sess. 61 (1956).

[19]Section 33(b) is not the only provision of the LHWCA that refers to compensation payments under an award or a compensation order. See, *e.g.*, 33 U.S.C. 913(a), 919(c), 921(a), 921(d), 922. Petitioner's contention that a formal compensation order is not required under Section 33(b), if accepted by this Court, could engender confusion for the future administration of these other sections of the Act. For example, an employee might argue that something less than a formal compensation order creates an obligation that is enforceable in district court. See 33 U.S.C. 921(d). See generally pages 4-5, *supra*.

other. As Arthur Larson, author of the leading workers' compensation treatise[20] and former Under Secretary of Labor, remarked before a congressional committee that was examining Section 33 of the LHWCA:

> The whole idea of third-party procedure, of course, is simply this: Occasionally in a workman's compensation situation a stranger will be involved, a stranger to the compensation, the third-party wrongdoer, and there is no reason why his liabilities should be affected in the slightest by the existence of a workmen's compensation relation between two other people. So when this third-party stranger is the tort feasor who caused the accident, it is quite possible that a new set of adjustments should take place, the *ultimate objective being that he, being the wrongdoer, should pay up in full as he would have done in any case* * * *.

Longshoremen's and Harbor Workers' Compensation Act (Third Party Liability): Hearing on Bills Relating to the Longshoremen's and Harbor Workers' Compensation Act Before the Special Subcomm. of the House Comm. on Education and Labor, 84th Cong., 2d Sess. 15-16 (1956) ("*Hearings*") (emphasis added). See also *Italia Societa per Azioni di Navigazione* v. *Oregon Stevedoring Co.*, 376 U.S. 315, 324 (1964); *Caldwell* v. *Ogden Sea Transport, Inc.*, 618 F.2d 1037, 1042 (4th Cir. 1980); S. Rep. No. 92-1125, 92d Cong., 2d Sess. 8, 10-12 (1972); H.R. Rep. No. 92-1441, 92d Cong. 2d Sess. 4, 6-8 (1972).

Petitioner's construction of Section 33(b) thwarts the ultimate objective of the legislation: imposing liability on third-party wrongdoers. Petitioner's position, if adopted, would prevent injured employees from pursuing meritorious third-party claims simply because they accepted compensation payments voluntarily profferred by their

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[20] 2A A. Larson, *The Law of Workmen's Compensation* (1976).

employers without a formal compensation order. While an employer could litigate the claim following assignment, this possibility has proven to be more hypothetical than real. An employer's dependence on vessel owners and charterers —the likely defendants in a third-party action — significantly reduces its willingness to bring suit. See *Hearings, supra,* at 16; note 18, *supra.* As a result, petitioner's reading of Section 33(b) reduces the practical extent of third-party liability under the Act.

Failure to hold third parties liable for their torts imposes costs on the LHWCA compensation system that are outside the scope of the basic compromise that led to its creation. Workers' compensation schemes are designed to provide prompt relief to injured workers at a fixed cost to the employer, without regard to questions of employer or employee fault. 2A A. Larson, *The Law of Workmen's Compensation* § 71.10, at 14-2 (1976). The LHWCA, "like most workmen's compensation legislation, * * * represents a compromise between the competing interests of disabled laborers and their employers." *Potomac Electric Power Co.* v. *Director, OWCP,* 449 U.S. 268, 281-282 (1980). To impose costs on the LHWCA arising from the fault of third parties unduly burdens the Act's essential "compromise" and bestows a windfall on third-party tortfeasors. A properly functioning workers' compensation system should maximize, rather than artificially restrict, recoveries from responsible third parties.

The assignment provisions of Section 33(b) of the LHWCA are intended to enhance the likelihood that third-party tortfeasors will be held accountable for their actions. Correctly construed, the section places control of the third-party cause of action in the hands of the injured employee — the party most likely to seek recovery. Only when the employee has been fully informed of his rights by the issuance of a formal compensation order, and then only after

the passage of six months, does control of the third-party cause of action shift to the employer. 33 U.S.C. 933(b). Thus, petitioner's position contravenes the basic purpose as well as the literal terms of Section 33(b) of the LHWCA.

The LHWCA should be liberally construed "in a way which avoids harsh and incongruous results." *Director, OWCP* v. *Perini North River Assoc.*, No. 81-897 (Jan. 11, 1983), slip op. 18; *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 271 (1979); *Voris* v. *Eikel*, 346 U.S. 328, 333 (1953); *Baltimore & Philadelphia Steamboat Co.* v. *Norton*, 284 U.S. 408, 414 (1932). The Court, as it has in the past, should reject a reading of the LHWCA, such as the one proffered by petitioner, that restricts the scope of this remedial statute. *Edmonds* v. *Compagnie Generale Transatlantique, supra*, 443 U.S. at 271; *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 278-279 (1977).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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No. 82-502

In the Supreme Court of the United States

October Term, 1982

PALLAS SHIPPING AGENCY, LTD.,
Petitioner,

vs.

JOSEPH DURIS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S MOTION OBJECTING TO THE FILING OF A BRIEF AMICI CURIAE ON BEHALF OF THE RESPONDENT BY LOCALS 1291, ET AL., OF THE INTERNATIONAL LONGSHOREMEN'S ASSOCIATION

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now the Petitioner, Pallas Shipping Agency, Ltd., pursuant to Rule 36 of the Rules of the Supreme Court, and objects to the filing of a Brief Amici Curiae on behalf of the Respondent by Locals 1291, *et al.*, of the International Longshoremen's Association for the following reasons:

1. Following the granting of the Writ of Certiorari by this Honorable Court, counsel for each of the principal parties involved informally agreed to consent to the filing

of one Amicus Brief in support of its position. Accordingly, Petitioner granted its consent to the Association of Trial Lawyers of America and Respondent granted its consent to a group of American shipowners.

2. There is no showing by movant's motion that questions of law involved in this appeal have not been adequately presented by the parties and Amici previously approved or consented to by both the Petitioner and Respondent.

3. Pursuant to Rule 36.4, a Brief Amicus Curiae has been filed on behalf of the United States by the Solicitor General as representative of the Secretary of Labor. The interest of the United States is stated in Amicus Brief, page 1, as follows:

> "* * * The Secretary of Labor, the government official charged with responsibility of administering the complex statutory provisions of the LHWCA, has a substantial interest in assuring that the Court has before it an accurate picture of the administrative procedures involved in this litigation and of the possible impact of the parties' positions on these procedures."

Obviously, the Secretary of Labor is charged with the administration of the LHWCA and therefore the testimony of an Assistant District Deputy Commissioner (erroneously described in the brief as the Deputy Commissioner) as set forth in the proposed Amici Brief of Local 1291 as to how he administered the Act and what he believes the procedure and law to be is irrelevant. The testimony of Mr. McTaggart is not only irrelevant but, occurring as it did in another case without the right of counsel for this Petitioner to cross-examine, violates the Petitioner's rights and it, together with all references to it in the Amici Curiae Brief, should be stricken.

5. The interests of Locals 1291, *et al.*, and the Respondent are fully protected by Amici Briefs already filed or to be filed in support of the Respondent by the Association of Trial Lawyers of America and the United States Government.

Respectfully submitted,

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No. 82-502-CFX
Status: GRANTED

Title: Pallas Shipping Agency, Ltd., Petitioner
v.
Joseph Duris

Docketed:
September 20, 1982

Court: United States Court of Appeals
for the Sixth Circuit

Counsel for petitioner: Ray,Lucian Y.

Counsel for respondent: Gallagher,Thomas W.

Entry	Date	Note	Proceedings and Orders
1	Sep 20 1982	G	Petition for writ of certiorari filed.
2	Oct 20 1982		Brief of respondent Joseph Duris in opposition filed.
3	Oct 27 1982		DISTRIBUTED. November 12, 1982
4	Nov 1 1982	X	Supplemental brief of respondent Joseph Duris filed.
5	Nov 15 1982		Petition GRANTED.
			**********
7	Dec 17 1982		Order extending time to file brief of petitioner on the merits until January 15, 1983.
8	Jan 14 1983		Brief of petitioner Pallas Shipping Agency, Ltd. filed.
9	Jan 14 1983		Joint appendix filed.
10	Jan 19 1983		Brief amicus curiae of American President Lines,et al filed.
12	Jan 26 1983		Order extending time to file brief of respondent on the merits until March 2, 1983.
13	Feb 17 1983		Brief amicus curiae of United States filed.
14	Feb 18 1983		Record filed.
15	Feb 18 1983		Certified original record & C.A. proceedings received.
16	Feb 28 1983		Brief of respondent Joseph Duris filed.
17	Mar 2 1983	G	Motion of Local 1291, et al. for leave to file a brief as amici curiae filed.
18	Mar 4 1983		Brief amicus curiae of Assn. of Trial Lawyers of Amer filed.
19	Mar 10 1983		Opposition of petitioner to motion of Local 1291, et al. for leave to file a brief as amici curiae filed.
20	Mar 21 1983		Motion of Local 1291, et al. for leave to file a brief as amici curiae GRANTED.
21	Mar 24 1983		SET FOR ARGUMENT. Monday, April 25, 1983. (2nd case) 1 hour
22	Mar 24 1983		CIRCULATED.
23	Apr 15 1983	X	Supplemental brief of respondent Joseph Duris filed.
24	Apr 18 1983	X	Reply brief of petitioner Pallas Shipping Agency, Ltd. filed.
25	Apr 25 1983		ARGUED.